Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-482

THE HON. ROBERT K. SMITH,
JUDGE, ET AL, ETC.,
Petitioners,

VS.

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC. ET AL.
Respondents

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,
Petitioners,

VS.

DON MARSH, ET AL., THE
DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

CLETUS B. HANLEY
Prosecuting Attorney
Kanawha County, West Virginia
BETTY L. CAPLAN
Assistant Prosecuting Attorney
Counsel for Petitioners
Kanawha County Courthouse
Charleston, West Virginia 25301

INDEX

Page

Prayer 1

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved .. 2

Statement of the Case 3

Reason for Granting the Writ 6

West Virginia Code 49-7-3 is not violative of the First Amendment to the Constitution of the United States in that it does not create an impermissible prior restraint on the freedom of the press 6

Conclusion 15

APPENDIX

Text of the Opinion of the Supreme Court of Appeals of West Virginia A-2

CITATIONS

CASES:

Cox Broadcasting Corporation v. *Cohn* 420 U.S. 469 (1975) 6, 12

Government of Virgin Islands v. *Brodhurst* 7, 8
285 F. Supp. 831 (D.C. Virgin Islands 1968)

Page

In Re Gault, 387 U. S. 1 (1967) 8

Landmark Communications, Inc. v. *Commonwealth of Virginia* 56 L. Ed. 2d 1 (1978) 14

Nebraska Press Association v. *Stuart* 427 U.S. 539 (1976) 6, 7, 12

Oklahoma Publishing Company v. *District Court of Oaklahoma County, Oklahoma*, 555 P. 2d 1286 (Okla. 1976) 10, 12

Oklahoma Publishing Company v. *District Court of Oklahoma County, Oklahoma*, ... U.S. ....., 51 L. Ed. 2d 355 (1977) ... 6, 7, 11

State ex rel Harris v. *Calendine* 233 S.E. 2d 318 (1977) 12

UNITED STATES CONSTITUTION

First Amendment 2

STATUTES:

28 U. S. C. 1257 (3) 2

West Virginia Code 49-7-3 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO._____

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

DON MARSH, ET AL, THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on June 27, 1978.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of

Appeals and the case is unofficially reported in—S.E. 2d—(1978). The opinion is set forth in full in the Appendix herein.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on June 27, 1978 and the Appellate Term of the Court below ended on July 14, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

West Virginia Code 49-7-3:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

STATEMENT OF THE CASE

On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia. The alleged assailant was a fourteen year old student, who was taken into custody and at a hearing in the Circuit Court of Kanawha County later that day was adjudged a delinquent. On the morning of February 10, 1978, a story appeared on the front page of the "Charleston Gazette" by Leslie H. Milam, Reporter, naming the alleged assailant in violation of West Virginia Code 49-7-3. Said statute forbids the publication of the name of a child in connection with any proceeding in a newspaper without a written order of the Court. In the same issue an editorial appeared on the editorial page

of that paper written by Don Marsh, editor, which read in full as follows:

> "Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St. Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.
>
> *It is against the law to publish names of juveniles charged with crimes in West Virginia.* When we decided to use Perrock's name, we decided to break the law.
>
> Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?
>
> I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.
>
> I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.
>
> On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years-until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.
>
> This is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal). Perhaps those of us who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. *Maybe the decision was simply wrong.*
>
> But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic fiction for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect," when we report on the youngster who is charged.
>
> *My opinion was part of the consensus to use the name.* I think *one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required.* As an example, I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.
>
> However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as courts allow." (Emphasis Supplied).

Respondent, "The Charleston Daily Mail", published the juvenile's name in relation to the shooting in the February 10, 1978 edition of the newspaper. Thereafter, at the January 1978 Term of the Kanawha

County Grand Jury, the respondents were indicted for misdemeanors for violating the above code section.

Both respondents filed petitions for a writ of prohibition with the Supreme Court of Appeals of West Virginia. On March 13, 1978, the Supreme Court issued a rule in prohibition making both cases returnable on May 16, 1978. Thereafter, on June 27, 1978, the Court held that West Virginia Code 49-7-3 was unconstitutional as violative of the First Amendment to the Constitution of the United States because it created an impermissible prior restraint upon the freedom of the press.

It is from the judgment of the West Virginia Supreme Court of June 27, 1978, that petitioners seek review by writ of certiorari.

REASON FOR GRANTING THE WRIT

WEST VIRGINIA CODE 49-7-3 IS NOT VIOLATIVE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT CREATE AN IMPERMISSIBLE PRIOR RESTRAINT ON THE FREEDOM OF THE PRESS

West Virginia Code 49-7-3 provides that with regard to any proceedings under that chapter, the name of a child shall not be published in any newspaper without an order of the court. Respondent newspapers deliberately violated the statute.

While this Court has discussed the issue of prior restraint on many occasions, the Court has never addressed the question under the facts presented. The "public record" rationale of *Cox Broadcasting Company* v. *Cohn*, 420 U. S. 469 (1975), *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976) and *Oklahoma Publishing Company* v. *District Court*, ... U. S. ....., 51 L. Ed. 2d 355 (1977), is not applicable here inasmuch as the child's name was not obtained from any public record or proceeding.

It is well established with this Court that First Amendment rights are not absolute, nor can prior restraints never be employed. *Nebraska Press Association*, supra. Petitioners submit that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight when considered in light of the interest that the statute seeks to protect, ie. a child's anonimity.

While not a decision by this Court, Petitioners would urge that the reasoning in the case of *Government of Virgin Islands* v. *Brodhurst*, 285 F. Supp. 831 (D. C. Virgin Islands, 1968) in which this issue was decided, be considered and adopted. There an appeal was taken by the publisher and managing editor of a newspaper who had been convicted and fined for violation of a statute which prohibited the publication of the name of a juvenile without an order from the court. The defendants argued that such a restraint was only permissible where a clear and present danger was involved and that publication of a juvenile's name in the newspaper was not a sufficient interest which would justify curtailing the liberty of the press. The Government responded that the legislature had acted within its power in providing that a child's welfare necessitated that they be cloaked with complete anonimity while subject to the court's jurisdiction. Moreover, the statute provided a means by which court authorization would be obtained to permit publication of a child's name.

In discussing the issue of freedom of the press the court quoted from *In re Gault*, 387 U. S. 1, 25 (1967):

> "In any event, there is no reason why, consistently with due process, a state cannot continue, if it deems appropriate, to provide and to improve provision for confidentiality of records of police contacts and court action relating to juveniles."

This Court has not retreated from the above view. Petitioners in the case at bar contend that it follows that a provision to enforce compliance with the provisions for confidentiality may also be legislated.

The court in *Government of Virgin Islands*, supra, recognized that:

> "It is not easy to define the permissible limitations on the constitutional right or to derive from the decisions generally applicable standards. While it is settled that the constitutional rights of freedom of speech and of the press embrace the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, it remains true that where the line is to be drawn in a particular case does not rest on generalities but rather on the concrete clash of particular interests and the community's relative evaluation, both of these interests and of how the one will be affected by a specific restriction and the other by its absence." (p. 837).

Quoting from *Thornhill* v. *State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093 (1940), the Court further stated:

> "It is imperative that when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (p. 837).

The Court then determined that:

> "Any attempt to restrict those liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (p. 837).

The Virgin Island Court held:

> "The 'clear and present danger' rule is not a mechanical test applicable in every case touching First Amendment freedoms, without regard to the context of its application." (p. 838).

Moreover, the court stated:

> ". . . when the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively slight and the public interest to be protected is substantial, *a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.* When particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (p. 838) (Emphasis supplied).

The Court then held that the advantages accomplished by the shielding of the names of juveniles from publicity out-weighed those gained by allowing the publication of the names of children. The limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders.

Further, the court held that inasmuch as the de-

fendants could have sought a court order to publish the juveniles' names, that the legislative intent was not an absolute prohibition, but it was properly left to the court's discretion as to whether the disclosure would serve any public interest.

In the case of *Oklahoma Publishing Company* v. *District Court of Oklahoma County, Oklahoma*, 555 P. 2d 1286 (Okla. 1976), the State Supreme Court discussed the advantages of having a juvenile's identity remain anonymous. An eleven year old boy was arrested and charged with deliquency because of the alleged commission of second degree murder. His name and picture were published by the petitioner, and subsequently the trial court issued an order enjoining the news media from using his name or picture. Petitioner then brought an action for writs of prohibition and mandamus.

Under the Oklahoma statute detention hearings are to be held in private unless the judge specifically orders the hearing to be held in public. 10 O. S. 1971 §1111.

The Court presented the conflicting interests as follows:

> "The argument for requiring juvenile proceedings to be confidential is that: exposure of a juvenile's record of delinquency would be likely to cause impairment of rehabilitative goals of the juvenile correction procedures which might encourage the juvenile offender to commit further acts of deliquency; cause the juvenile offender to lose employment opportunities, or otherwise suffer unnecessarily; bring undue humiliation upon his family because of his youthful transgressions; and that publicity may afford the hard core delinquent the kind of recognition he desires. The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceeding could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of denial of the right of press to unrestrainedly gather the news." (p. 1292)

The state court concluded that the restraint on the press in being precluded from publishing a juvenile's name was valid in light of the interest in the possible rehabilitation of the offender and his subsequent integration into society.

This Court reversed the Oklahoma Court on the ground that even though the trial judge had not specifically ordered the detention hearing to be open to the public, members of the press were in fact present at the hearing with the knowledge of the judge, the prosecutor and defense counsel, and no objection was made. Therefore, the Court held that the press could not be enjoined by a court order from publishing the juvenile's name and picture inasmuch as the name had been revealed during a "public" proceeding. *Oklahoma Publishing Company* v. *District Court*, 51 L. Ed. 2 355 (1977). The Oklahoma statute was not declared unconstitutional as being a prior restraint as was held by the West Virginia Supreme Court in this case.

Such is not the situation in the case at bar. The respondents did not obtain the youth's name from any public record or hearing. Nor was his name gotten by lawful means or with the State's approval. It was

obtained through their own investigation, and then, respondents flagrantly violated the law by publishing the juvenile's name and picture.

Petitioners assert that the reasoning set forth in *Oklahoma Publishing Company*, supra, by the Oklahoma Supreme Court regarding the balancing of the probable effects of the statute upon the right of the freedom of the press against the advantages accruing to the juvenile is applicable to the present case.

As stated above this Court has not reached the issue raised by the facts in the case at bar. In fact this Court has expressly refrained from deciding questions involving state policy which denies the public and the press access to juvenile records. *Cox Broadcasting Corporation* v. *Cohn, supra; Nebraska Press Association* v. *Stuart*, supra.

Code 49-7-3 does not preclude the press from publishing the circumstances surrounding an event such as we have here. The statute states only that a child's name shall not be published. Therefore, the press can still be the watchdog of the system and report matters of public interest.

The State of West Virginia through the legislature and the courts has adopted a policy of rehabilitation for juveniles, and for the confidentiality of proceedings and records of youthful offenders. West Virginia Code 49-5-1 (d) and 49-7-1 (as amended 1977). In *State ex rel Harris* v. *Calendine*, 233 S. E. 2d 318 (W. Va. 1977), Justice Neely discussed at length the State's policy toward juveniles. Although the decision spoke of the rights of status offenders, comments found in the opinion apply to all juvenile offenders, especially

in light of the 1977 Amendments to the juvenile law that a juvenile may no longer be transferred to adult court. It should be noted that should Code 49-7-3 be declared unconstitutional the press would be allowed to publish not only the names of those youths charged with delinquency because of the commission of violent criminal offenses, but also those charged with delinquency as status offenders. For example, a youth who has been habitually absent from school without good cause (Code 49-1-4(4), as amended 1977) could be proceeded against under Chapter 49 and his name published the newspaper. What public interest arises there? In balancing the interests between the freedom of the press and the juvenile's interest in anonimity, petitioners contend that clearly the juvenile's interest and the state's interest in protecting the youth outweigh the public's right to know.

As Justice Neely stated in *Harris*, supra:

> "Furthermore, the status offender is inherently in a different class from the criminal offender. The Legislature could choose to punish children guilty of criminal conduct in the same manner as it punishes adults, but *as a matter of public policy* the Legislature provided instead for a comprehensive system of child welfare. *The aim of this system is to protect and rehabilitate children, not to punish them.*" (p. 325) (Emphasis Supplied).

Moreover,

> "Since the class to which status offenders belong has been created under authority of the State's inherent and sovereign parens patriae power, *Warner Bros. Pictures* v. *Brodel*, 179 P. 2d 57 (Cal. App 1947); *Johnson* v. *State*, 18

> N. J. 422, 114 A. 2d 1 (1955), and not under the plenary powers of the State to control criminals, *Barker* v. *People*, 2 Cow. (N.Y.) 686 (1824), status offenders must be treated in a fashion consistent with the parens patriae power, namely, they must be helped and not punished . . . " (p. 326).

When a newspaper publishes a child's name, regardless of the offense the notoriety which results therefrom would scar rather than scare, and, further, handicaps his prospects for future adjustment in society and acceptance by the public.

The West Virginia Supreme Court cited the case of *Landmark Communications, Inc.*, v. *Commonwealth of* Virginia, ... U. S. ....., 56 L. Ed. 2d 1 (1978) for the proposition that the Virginia statute jeopardized free discussion and constituted an improper prior restraint. Petitioners contend that a close reading of *Landmark* reveals that the case was not decided on the issue of whether the statute created an impermissible prior restraint. In fact, this Court stated that that was not the issue, and more specifically, that the statute did not constitute a prior restraint.

Finally, and perhaps most importantly, Code 49-7-3 provides that a newspaper may publish a child's name upon obtaining an order from the Court. Therefore, petitioners assert that the statute does not impose an absolute prohibition. The judge is the proper person to determine whether a child's name should be published, because he possesses the necessary legal expertise, and, as judge he has the duty to uphold the State's policy of protecting the juvenile for later rehabilitation.

Respondent submits that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight and the interest the statute seeks to protect is substantial. The press is usually more interested in events than in names and under West Virginia law no prohibition is placed upon the press as to the reporting of events, such as the shooting here.

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully Submitted,

CLETUS B. HANLEY
Prosecuting Attorney
Kanawha County, West Virginia

BETTY L. CAPLAN
Assistant Prosecuting Attorney
Kanawha County Courthouse
Charleston, West Virginia 25301
Counsel for Petitioners.

APPENDIX

NO. 14158

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.

v

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.

NO. 14180

DON MARSH, ET AL.
THE DAILY GAZETTE CO., ETC., ET AL.

v

HON. ROBERT K. SMITH, JUDGE, ETC.

In Prohibition — Writ awarded.

Neely, Justice

1. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.

2. To the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code*, without the prior approval of the trial court, *W. Va. Code*, 49-7-3 [1941] is unconstitutional as repugnant to the First Amendment to the *Constitution of the United States* because it creates an impermissible prior restraint on the freedom of the press.

Neely, Justice:

These two cases, which have been consolidated for

decision, both present a conceptionally indisguisable permutation of a classic First Amendment, freedom-of-the-press issue concerning prior restraint on publication which the United States Supreme Court has addressed numerous times in the last ten years. These original jurisdiction proceedings seek to prohibit the respondent judges of the Circuit Court of Kanawha County, and the Prosecuting Attorney of Kanawha County from prosecuting petitioners under *W. Va. Code*, 49-7-3 [1941] which forbids any newspaper from publishing the name of a child in connection with any juvenile proceeding without the permission of the trial court. The petitioners are the *Charleston Gazette;* its Publisher, W. E. Chilton, III; its Editor, Don Marsh; one of its reporters, Leslie H. Milam; *The Charleston Daily Mail;* its Editor, Jack Maurice; and one of its reporters, Mary Schnack.

On 10 February 1978 both newspapers printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The respondent prosecuting attorney sought and obtained indictments against petitioners on 1 March 1978 for knowingly and unlawfully violating *Code*, 49-7-3 [1941]. That statute provides:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such

> child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

Petitioners urge that *W. Va. Code*, 49-7-3 [1941] violates *W. Va. Const.*, art. 3, § 7, which is the state counterpart to the First Amendment to the *Constitution of the United States.* While ordinarily a constitutional question would be decided on state grounds in the first instance, thus avoiding a needless federal question, we find that in this instance it is better practice to rely upon a well developed body of federal law rather than an essentially nonexistent body of state law. Our regular use of state constitutional provisions is grounded in their capacity to be broader, in the sense of being more protective of individual rights, than the federal constitution; however, with regard to the First Amendment it would be difficult to find a more expansive interpretation of freedom of the press than that developed by the Supreme Court of the United

States. Even if we were to hypothesize that a broader guaranty might one day be necessary, it would be unwise to formulate new rules in the context of cases whose facts do not compel a minute inquiry into the sagacity of the new rules urged upon us. Furthermore, it is more serviceable to use federal law because of the interrelationship among all of the various news media, some of which are primarily governed by federal law, thereby providing a uniform resolution of these issues throughout the United States.

Recent cases demonstrate that the United States Supreme Court is concerned with all cases involving the First Amendment and that they are regularly responsive to the need for daily supervision of this area of the law throughout the United States. Accordingly in the interest of comprehensibility and uniformity we decide this case according to crystal clear principles of federal law concerning freedom of the press.

I

The preeminent rule with regard to prior restraint on free speech has recently been articulated by the Chief Justice of the United States in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), citing with approval *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971):

> Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.

An exegesis of the reasoning of the Supreme Court of the United States with regard to the issue of prior restraint is hardly appropriate here since that Court has done it in substantial length themselves in numerous cases involving this very issue.[1]

---

[1] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (denying use of municipal facilities for a play production based on city board's judgment of content is an impermissible prior restraint); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (court order barring newspaper from referring to sex in employment headings not prior restraint endangering free speech; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 1969) (overbroad parade permit requirements unconstitutional); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968) (injunction against a public meeting, granted without a hearing, constitutes an unconstitutional prior restraint); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (motion picture censorship statute unconstitutional); *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (system of informal censorship of books held unconstitutional); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (denial of a film license on basis film was "sacrilegious" unconstitutional); *Niemotko* v. *Maryland*, 340 U.S. 268 1951) lack of standards in license-issuing practice for city park use makes the practice a prior restraint in contravention of the 14th Amendment). *Grosjean* v. *American Press Co.*, 297 U.S. 233 1936) (invalidating discriminatory tax on press as an impermissible prior restraint). In addition to these are the cases of *Landmark Communications, Inc.* v. *Commonwealth of Va.*, U.S. , 56 L. Ed.2d 1 (1978); *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L. Ed.2d 355 (1977); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) and *Near* v. *Minnesota*, 283 U.S. 697 (1931) which are discussed in the text of this opinion.

Although the Supreme Court has never taken an absolutist position that there can be no abridgment of the freedom of the press under any circumstances, it would appear that outside of the area of pornography there is no governmental interest sufficiently compelling to justify a prior restraint in times of peace. We suspect, although we cannot prove, that the Supreme Court would authorize a prior restraint with regard to publication of military intelligence in a time of serious national peril and concerning a dangerous and indispensable operation such as the Allies' invasion of Normandy in 1944. A relatively concise statement of the two well recognized exceptions to absolute freedom from prior restraint was stated in *Near* v. *Minnesota*, 283 U.S. 697 (1931) and cited with approval by Justice Brennan in his concurring opinion in *Nebraska Press Assn.*, *supra*, as follows: (1) to prevent the disclosure of information that would inevitably, directly, and immediately cause irreparable damage to the Nation in time of war; and (2) to suppress expression which is simply not deemed "speech" within the meaning of the First Amendment, such as obscenity or incitements to violence or revolution by force. In addition to these two exceptions discussed by Justice Brennan, it appears that with regard to acts which are verbal in nature, as for example a parade, a third exception is the regulation of the time, place and manner of expression, without unduly limiting the opportunity for expression. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

II

It is inevitable that if the Supreme Court takes something less than an absolutist position that all those

who seek to impose prior restraint upon the press will attempt to bring themselves within the exceptions. So it is in these cases that the State of West Virginia argues that a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice, are sufficiently compelling to permit the statute under review to withstand constitutional scrutiny. We disagree with this conclusion because the Supreme Court of the United States has uniformly held over the past ten years that similar legitimate state and private interests were not sufficiently compelling to permit a prior restraint. The case of *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed.2d (1977) leaps instantly to mind in this regard. In that case an Oklahoma statute provided for juvenile proceedings to be held in private and for juvenile records to be open to public inspection only by order of the court. A state court enjoined news media from publishing the name or photograph of an eleven year old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second degree murder. The Supreme Court, recognizing all of the beneficent purposes to be served by confidentiality held the prior restraint unconstitutional. We see little distinction between that case and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute while in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt.

If there were any doubt about prior restraint after *Oklahoma Publishing*, it was laid to rest in *Landmark Communications, Inc.* v. *Commonwealth of Va.*, *U.S.*

, 56 L.Ed.2d 1 (1978) where the Commonwealth of Virginia attempted to subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before state judicial review commissions. The Supreme Court recognized the legitimate state interest to be served by secrecy, namely "the confidentiality requirement can be said to facilitate the work of the commission in several practical respects. When removal or retirement is justified by the charges, judges are more likely to voluntarily resign or retire without the necessity of a formal proceeding if the publicity which would accompany such proceeding can thereby be avoided." Nonetheless the Supreme Court found that the integrity of government by free discussion would be jeopardized by this particular prior restraint and invalidated the statute.

Finally, in the case of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975) the Supreme Court held that a Georgia tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim (which was a matter of public record) was an unconstitutional restraint in spite of the legitimate state interest in protecting innocent vicims from embarrassment.

The Supreme Court over the past 50 years has had briefed before them every conceivable First Amendment issue by the ablest and most agile legal minds of this century; nonetheless, after repeated, well-considered, and apparently agonizing evaluation of the issues involved, that Court has concluded that a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent

operation of a democratic society.[2] While it makes no difference whether we agree with them, we gratuitously add that we do. Accordingly we find that to the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code* it is repugnant to the First Amendment to the *Constitution of the United States* as a prior restraint on the freedom of the press.[3] Accordingly the writs of prohibition for which petitioners pray are awarded.

Writ awarded.

[2]*See*, for example, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) involving the famous "Pentagon Papers" during the Vietnam War. Counsel on all sides were among America's most eminent.

[3]As we have resolved this issue on broad First Amendment grounds, we find it unnecessary to reach the issue of whether *W. Va. Code*, 49-7-3 [1941] unconstitutionally discriminates against newspapers; is unconstitutional when seeking to sanction acts which could not endanger the legitimate state purposes sought to be achieved; or, violates the *West Virginia Constitution* because the title of Chapter 65, *Acts of the Legislature*, Regular Session 1977 failed to set forth in the title to the act the fact that such act was making it a crime to publish the name of the child accused of a capital offense.

CERTIFICATE OF SERVICE

I, CLETUS B. HANLEY, one of Counsel for the Petitioners, and a member of the Bar of The Supreme Court of The United States, hereby certify that, on the 18th day of September, 1978, I served three copies of the foregoing Petition for a Writ of Certiorari on each of the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Rudolph L. DiTrapano, Attorney at Law, DiTrapano, Mitchell, Lawson and Field, 604 Virginia Street, East, Charleston, West Virginia 25301 and F. Paul Chambers, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322. I further certify that all parties required to be served have been served.

Cletus B Hanley

Prosecuting Attorney
Kanawha County Courthouse
Charleston, West Virginia 25301
Counsel for Petitioners.

Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE WEST VIRGINIA
SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 21, 1978
CERTIORARI GRANTED NOVEMBER 13, 1978

INDEX

Page

Notation Re Opinion Below 1

The Joint and Several Petition of the Daily Mail Publishing Co., Jack Maurice, and Mary Schnack for Writ of Prohibition in the Supreme Court of Appeals of West Virginia 2

Indictment for Misdemeanor in the Circuit Court of Kanawha County, and Exhibits 11

Petition of Don Marsh, W. G. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam for Writ of Prohibition, in the Supreme Court of West Virginia 24

Indictment for Misdemeanor, in the Circuit Court for Kanawha County 28

Answer of the Honorable Robert K. Smith, Judge of the Circuit Court of Kanawha County, in the Supreme Court of Appeals of West Virginia 30

Demurrer to the Answer of the Respondent, in the Supreme Court of the State of West Virginia ... 32

Demurrer in the Supreme Court of Appeals of West Virginia 33

Prohibition 14158 35

Prohibition 14180 37

Prohibition 14158 39

Notation Re Opinion Below

The opinion below is reproduced in the Petition heretofore filed with this Court. A corrected and final opinion reproduced in the Reply to the petition of the Charleston Daily Mail. The latter opinion now appears in 248 S.E.2d 269 (1978).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

In Prohibition Original Jurisdiction

THE STATE OF WEST VIRGINIA AT THE RELATION OF DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Petitioners,*

vs.

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. MCHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HEY, and THE HONORABLE A. ANDREW MACQUEEN, Judges of the Circuit Court of Kanawha County, West Virginia,

and

THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents.*

The Joint and Several Petition of The Daily Mail Publishing Co., Jack Maurice, and Mary Schnack for Writ of Prohibition

TO THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Your joint and several Petitioners, Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice and Mary Schnack, jointly and severally respectfully represent unto your Honors as follows:

1. Petitioner Daily Mail Publishing Co. is a West Virginia corporation with its principal office in Charleston, West Virginia, and Petitioners Jack Maurice and Mary Schnack are citizens, residents and taxpayers of Kanawha County, West Virginia, wherein Daily Mail Publishing Co.

owns and publishes six days a week, Monday through Saturday, a daily afternoon newspaper known as the Charleston Daily Mail. Although the Charleston Daily Mail is printed and circulated by Charleston Newspapers, an unincorporated joint venture of The Daily Gazette Company, owner and publisher of The Charleston Gazette, and Daily Mail Publishing Co., the news and editorial content of the Charleston Daily Mail and the Charleston Gazette are each under the separate and independent control of the Daily Mail Publishing Co. and The Daily Gazette Company, respectively, each of which operates through a separate staff of news and editorial employees. Your Petitioner Jack Maurice is and, at all times material herein, has been, Editor of the Charleston Daily Mail. Your Petitioner Mary Schnack is and, at all times material herein, has been a news reporter for the Charleston Daily Mail.

2. Respondent the Honorable Robert K. Smith, and the other Circuit Judges named in the caption hereto, are the duly elected, qualified and acting Circuit Judges of the Thirteenth Judicial Circuit of West Virginia, which Circuit is comprised of the County of Kanawha, and your Petitioners aver upon information and belief, that the indictment of these Petitioners, hereafter described, has been assigned to the Respondent Robert K. Smith, and your Petitioners have been ordered to appear before Judge Smith on March 21, 1978, at 9:30 a.m., EST.

3. The Respondent the Honorable Cletus B. Hanley is the duly appointed, qualified and acting Prosecuting Attorney for Kanawha County, West Virginia.

4. On March 1, 1978, the Grand Jurors in and for the County of Kanawha, serving during the January 1978 term of the Circuit Court of said County, returned an indictment against your Petitioners, a true copy whereof is attached hereto as Exhibit A and incorporated herein by reference, charging that your Petitioners ". . . on the 10th day of Februray, 1978, . . . in the said County of Kanawha,

did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of 14 years, in the Charleston Daily Mail, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against this said Stuart Wayne Perrock . . . without a written order of said Circuit Court of Kanawha County . . . ."

5. The material facts relating to the publication of Perrock's name in the Charleston Daily Mail on Friday afternoon, February 10, 1978, as related to the Grand Jury of Kanawha County by your Petitioner Jack Maurice, under oath, in a voluntary appearance before that body on March 1, 1978, are substantially as follows:

(a) On the morning of Thursday, February 9, 1978, newsroom employees of the Charleston Daily Mail monitoring the police band radio frequency, learned that there had been a shooting at Hayes Junior High School in St. Albans, West Virginia. Mary Schnack, one of the Petitioners, and Chambers Williams, both Daily Mail reporters, and Daily Mail photographer Chet Hawes, were directed to the scene to cover the story.

(b) From these reporters the Daily Mail learned that there were several eye-witnesses to the death by gunshot of a juvenile student, Arthur Smith, in a school hallway that morning, and that the assailant who allegedly shot Smith was another juvenile student, allegedly Stuart Perrock. Notwithstanding the fact that the identity of Smith's alleged assailant was apparently known throughout the school and Perrock had been taken into custody, Petitioner Maurice was aware of the provision of W. Va. Code § 49-7-3 under which your Petitioners were indicted and made a decision not to use Perrock's name in the Daily Mail story about the event published in the Charleston Daily Mail in its edition of Thursday evening, February 9, 1978, a copy

of which story is attached hereto as Exhibit B and made a part of this Petition by reference.

(c) Early on the morning of February 10, 1978, as the news and editorial staff of the Charleston Daily Mail reported for work to produce the news and editorial content of that afternoon's edition of the Daily Mail, your Petitioners learned that it was already public knowledge that Stuart Wayne Perrock had been taken into custody and was being held in connection with the death of Arthur Smith, pending further proceedings pursuant to Chapter 49 of the West Virginia Code, as amended. The source of this information was as follows: (i) Petitioners Maurice and Schnack read the story in the Charleston Gazette on Friday morning, February 10, 1978, appearing under the headline "Youth Can't Be Charged With Murder", which was accompanied by a three column picture of Perrock in the custody of three Kanawha County Deputy Sheriffs; Perrock was identified by name in both the caption to the picture and the story, all of which appeared on page one of that paper, a copy of which is attached hereto as Exhibit C and incorporated herein by reference; (ii) Petitioner Schnack, on her way to work on the morning of February 10, 1978, heard Perrock's name used in connection with the same story in a radio broadcast from Station WVAF received on her car radio, and so reported to her Editor; (iii) Petitioner Schnack also was told by Lieutenant W. T. Markham of the Kanawha County Sheriff's Office that Perrock's name had been used in connection with the Smith slaying by WCHS radio on a Thursday broadcast, which report she passed along to her Editor; and (iv) David Greenfield, another news reporter employed by the Charleston Daily Mail, reported to Petitioners that he had heard Perrock identified as Smith's slayer in a radio broadcast from WCAW on Friday morning.

(d) Faced with the fact that it was then public knowledge that Stuart Wayne Perrock, a juvenile, was being de-

tained in connection with the death of Smith, Petitioner Maurice concluded that he must reevaluate his earlier decision not to use Perrock's name. After consulting associates in the Editorial Department of the Daily Mail who had input in the decision making process, Petitioner Maurice, at approximately 8:00 o'clock a.m., telephoned Daily Mail's legal counsel on First Amendment matters and recited to him the facts substantially as hereinbefore averred in this numbered paragraph of this Petition. Petitioner Maurice was advised by counsel that even if the statute prohibiting identification of Perrock in a newspaper, without a court order, was otherwise valid, the purpose of the statute was no longer possible of accomplishment and it was counsel's opinion that the Daily Mail was justified in no longer suppressing the use of Perrock's name.

(e) Petitioner Maurice thereafter decided to publish the juvenile's name and his decision was communicated to his associates and subordinates, including Petitioner Schnack. The Daily Mail story disclosing Perrock's name and picture, which was thereafter published in the Charleston Daily Mail in its Friday evening edition of February 10, 1978, is attached hereto as Exhibit D and made a part hereof by reference. The facts reported in Exhibit D, insofar as they are material herein, are true.

6. The West Virginia statutes, which are the sole legal bases for the indictment of your Petitioners, are Chapter 49, Article 7, Sections 3 and 20 of the West Virginia Code, as amended, which read as follows (with the relevant portion emphasized):

49-7-3

"Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; *nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court;* nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

49-7-20

"A person who violates an order, rule, or regulation made under the authority of this chapter, *or who violates a provision of this chapter for which punishment has not been specifically provided,* shall be guilty of a misdemeanor, and upon conviction shall be fined not ess than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

7. Petitioners did not apply for an order from the Circuit Court of Kanawha County permitting the publication of Perrock's name. Petitioners aver, on information and belief, that to have done so would have compromised their position that such Court has no valid constitutional jurisdiction by virtue of W. Va. Code § 49-7-3 to exercise any prior restraint upon the Daily Mail publication of Perrock's name in the context of the facts hereinbefore alleged.

8. Your Petitioners are advised and believe that the indictment returned against them by the Grand Jurors of Kanawha County is a nullity and that the Respondents have no power to try or otherwise exercise any power over these Petitioners pursuant to said indictment because the

statute upon which the indictment is founded, insofar as it would operate to prohibit the Daily Mail publication of Perrock's name, is unconstitutional as violative of:

(a) Article 3, Section 7 of the West Virginia Constitution which reads as follows:

> "§ 7. No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

(b) Article 5 of the West Virginia Constitution.

(c) The First Amendment to the Constitution of the United States, which prohibits the Congress from making any law abridging freedom of speech or freedom of the press, made applicable to State action by the Fourteenth Amendment to the Constitution of the United States.

(d) The Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

(e) Article 3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

9. Upon information and belief that unless prohibited by this Court, Respondents will proceed, without jurisdiction, to bring your Petitioners to trial pursuant to a void indictment based on a void statute. No West Virginia court other than the Supreme Court of Appeals of West Virginia has jurisdiction to issue a Writ of Prohibition against one or more of the judges of the Circuit Court of Kanawha County.

10. Petitioners do not now believe that taking of evidence will be necessary.

WHEREFORE, your Petitioners pray:

1. That a rule be issued by this Honorable Court, directed to the Respondents, to show cause, if they or any of them can, why the said honorable judges of the Circuit Court of Kanawha County, as aforesaid, should not be prohibited from entering any order or taking any other action with respect to the indictment of these Respondents attached hereto as Exhibit A; and that a rule also be issued by this Honorable Court, directed to the Respondent, the Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, to show cause, if he can, why he should not be prohibited from further prosecuting or seeking to prosecute these Respondents or any of them by reason of the publication in the Charleston Daily Mail of February 10, 1978, of the name of Stuart Wayne Perrock, an infant, in connection with a proceeding under the provisions of Chapter 49 of the Code of West Virginia.

2. That this Honorable Court enter an Order suspending, until final decision of this cause by this Honorable Court, the proceedings sought to be prohibited hereby.

3. That after the Respondents shall have had an opportunity to respond to such rule, a Writ of Prohibition may be awarded to your Petitioner, prohibiting all of the Respondents from entering any order or taking any action with respect to any further proceedings against these Petitioners, or any of them, by reason of the aforesaid indictment, excepting only such order or action as may be appropriate, just and proper to void said indictment and to restore the criminal records of each of these Petitioners to their former status, as if said indictment had never been returned.

4. That this Honorable Court do give your Petitioners and each of them such other and further relief as it may deem to be appropriate and as this case may require.

DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK

By Counsel

/s/ F. PAUL CHAMBERS
F. Paul Chambers

/s/ MICHAEL A. ALBERT
Michael A. Albert

/s/ ALVIN L. EMCH
Alvin L. Emch

/s/ DANIEL L. LARCAMP
Daniel L. Larcamp
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Petitioners

[Certificate of Service deleted in printing]

[Subscriptions deleted in printing]

Exhibit A

No.

THE CIRCUIT COURT OF KANAWHA COUNTY

JANUARY TERM, 1978

STATE OF WEST VIRGINIA

v.

JACK MAURICE, DAILY MAIL PUBLISHING CO., a corporation and MARY SCHNACK

Indictment for Misdemeanor

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that JACK MAURICE, DAILY MAIL PUBLISHING CO., a corporation and MARY SCHNACK, on the 10th day of February, 1978, and prior to the date of the finding of this indictment, in the said County of Kanawha, did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years in the Charleston Daily Mail, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock, a child of the age of fourteen years, in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County, against the peace and dignity of the State.

Found at the JANUARY Term of said Court, 1978, upon the information of Jack Maurice, Charleston, West Virginia.

Exhibit B

HAYES SCHOOLMATE HELD

Junior High Student Slain

By MARY SCHNACK
And CHAMBERS WILLIAMS
Of The Daily Mail Staff

A 14-year-old boy was apprehended today in the woods near Hayes Junior High School about three hours after he allegedly shot and killed a 15-year-old ninth grade in a hallway at the St. Albans school.

Killed at 7:55 a.m., minutes before classes were to begin, was Arthur Clinton Smith, son of Mr. and Mrs. Frazier Carl Smith of Coal River Road, St. Albans. The boy was shot once in the center of the chest with a .22-caliber pistol and died a few minutes later on the hallway floor outside the gymnasium, according to Lt. W.T. Markham of the Kanawha County sheriff's office.

The victim lived with this parents in a trailer within a block of the school.

The shooting momentarily sent panic through the neighborhood, and parents who heard about the incident rushed to the school to take their children home. Some parents feared that children who witnessed the shooting would be emotionally upset. Some children were in tears when they met their parents.

Markham said the suspect fled the building, and than ran across Strawberry Road and up a wooded hilside. Seven studlents witnessed the shooting, he said.

The suspect was chased by sheriff's deputies on foot and state police in a helicopter. He was found and returned to the school in the helicopter at 11:15 a.m., and was taken to the school guidance office for questioning. The youth emerged from the helicopter handcuffed and surrounded by law enforcement officers.

Police, who were tracking the suspect by his footprints, said they found a message scrawled in the snow, which read, "Tell Smith I'm sorry."

Markham said he was told the victim and his assailant had been at odds because of an incident at the school in December in which a bulletin board was set afire. The Smith youth was subsequently cited in juvenile court for arson in the incident, authorities said.

Witnesses told authorities the two exchanged words just before Smith was shot. Markham said there was no scuffle.

However, Markham said that within the past three weeks several fistfights had occurred involving Smith, the suspect and two other youths.

Markham said that authorities are trying to determine how the juvenile obtained the pistol.

The victim's grandmother, Icy Deweese, who lives next door to the school on Coal River Road, was present when her grandson's body was placed in an ambulance.

"He spent last night with me," she said. "Everything seemed fine. He even emptied the garbage and burned some papers for me. He kept things to himself."

The Smith family's trailer is next door to Mrs. Deweese's house. She added that she was close to him and knew of no problems he was having at school.

F. Douglas Stump, president of the Kanawha County Board of Education, said that all students were seated in their homerooms after the incident. Classes resumed at 11 a.m. "It's highly unusual for a gun to be on a school facility but highly impossible to protect against it," he said.

Exhibit C

Gazette Photo by DAVID VIC

HANDCUFFED Stewart Wayne Perrock is escorted to a police car by deputies after being charged Thursday in the shooting death of a fellow student at Hayes Junior High School in St. Albans.

In St. Albans School Incident

Youth Can't Be Charged With Murder

By Leslie H. Milam
Staff Writer

A 14-year-old St. Albans youth arrested Thursday following the shooting death of a fellow student at Hayes Junior High School can't be charged with murder.

The youth, identified as Stewart Wayne Perrock of Browns Creek near St. Albans, is being held in the Dunbar Child Shelter in lieu of $50,000 bond. He is scheduled to appear next Thursday before Chief Circuit Judge Thomas McHugh.

Lt. W. T. Markham said the youth was arrested on a juvenile delinquency charge after a petition was filed charging him with murder.

A spokesman for the state medical examiner's office in South Charleston said the victim of the shooting, Arthur Clinton Smith, 15, was shot three times in the chest.

The spokesman the autopsy indicated that the gun, a .22-caliber pistol, was against Smith's body when two of the shots were fired and that the bullets struck the Smith youth's heart.

Deputies Said the shooting occurred shortly after 8 a.m. inside the school on Strawberry Road in St. Albans just outside the school gymnasium. Seven students witnessed the shooting.

See "Don Marsh on Newspapering" on Page 4A.

Following the shooting, deputies said, the suspect ran from the school. Deputies tracked the youth through the snow and at one point found a message scrawled in the snow: "Tell Smith I'm sorry."

Shortly after the message was found, investigators said, state policemen in a helicopter spotted the suspect near the river bank not far from the school. He was arrested and returned to the school for questioning.

Deputies said they recovered the pistol and are attempting to determine where the weapon was obtained.

Markham said he was told trouble had occurred previously between the two youths and that there had been several fistfights involving Smith, the suspect and two other boys.

Markham said one report indicated Smith and the suspect had been arguing since a bulletin board at the school was set on fire in December. The Smith youth was cited for arson in the incident, deputies added.

One Investigator said Perrock was a witness in the arson case and was to have testified against Smith.

Smith's grandmother, Mrs. Icy Deweese, who lives near the school, came to the school about two hours after the shooting. "Oh God, I can't believe this. Everything was fine. He even emptied the garbage for me and burned some papers. I just found out about this and I can't believe it's happened."

Kanawha County Sheriff G. Kemp Melton said the investigation of the case is being complicated by the laws dealing with juveniles. "I have been asked to testify at an open hearing Wednesday before the House Judiciary Committee and I will testify. I think some changes need to be made in these laws."

Because Perrock is a juvenile, he can only be charged with juvenile delinquency. If he is found guilty, the maximum penalty Perrock can be given is to be sentenced to a juvenile detention center until he is 18.

Smith is survived by his parents, Mr. and Mrs. Frazier Smith of St. Albans; brothers, Denziel of St. Albans and

Wayne at home; grandparents, Mrs. Icy Deweese of St. Albans, Homer Deweese of Hometown.

Friends may call after 3 p.m. Saturday at Casdorph-Curry Funeral Home in St. Albans.

DON MARSH ON NEWSPAPERING

A Juvenile Issue

Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St. Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.

It is against the law to publish names of juveniles charged with crimes in West Virginia. When we decided to use Perrock's name, we decided to break the law.

Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?

I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.

I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.

On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years—until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.

There is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal.) Perhaps those of us who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. Maybe the decision was simply wrong.

But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic ficton for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect" when we report on the youngster who is charged.

My opinion was part of the consensus to use the name. I think one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required. As an example. I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.

However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as courts allow.

Exhibit D

CBs And Cycles

Slain Boy Had A Typical Teen's Interests

By Mary Schnack
Of The Daily Mail Staff

In many respects he was a normal 14-year-old who enjoyed rock music, motorcycles and talking on the CB, which was what he was doing Thursday morning an hour before he left for Hayes Junior High School in St. Albans.

In a hallway at school shortly before classes began, Arthur Smith died of three gunshot wounds in the chest.

His mother, Mrs. Frazier Smith of Coal River Road, said he would turn on the radio first thing in the morning, and after he came home from school; the CB, she said, consumed much of his spare time. His handle was "Pinball Wizard."

"This is so uncalled for. I'm too upset to know what to do," Mrs. Smith said today, sobbing, speaking with great difficulty about her son's life.

Stuart Wayne Perrock, 14, of Browns Creek, is being held in the Dunbar Child Shelter in lieu of $50,000 bond in connection with the shooting. Chuck Miller, Kanawha County assistant prosecuting attorney, said Perrock is charged with an "act of juvenile delinquency by virtue of committing a murder."

Miller said a juvenile must be over 16 to be tried as an adult. The most severe penalty a juvenile charged with delinquency can receive is incarceration in a juvenile center until he is 18, Miller added.

A preliminary hearing for Perrock will be held Thursday before Kanawha Chief Circuit Judge Thomas McHugh. Miller said it will be determined at the hearing if there is

enough evidence, or probable cause, to hold Perrock on the charge.

Perrock and Smith had a brief exchange of words minutes before classes were to begin at 8:10 a.m., said Lt. W.T. Makham of the Kanawha County sheriff's office.

Markham said three shots from a .22 caliber pistol were fired at close range into Smith's chest. The gun was directly against his chest when at least one shot was fired, Markham added.

Smith died within four minutes after being struck, Markham said.

Seven students, including Perrock's bother, witnessed the shooting, Markham said.

Sheriff's deputies are checking into a lead they obtained this morning concerning the gun's origin, Markham said. He said authorities do not believe the gun was obtained from the suspect's parents.

After the shooting, Markham said Perrock fled the school and crossed Strawberry Road and ran into the woods. Deputies, who were following the boy's footsteps, found a message scrawled in the snow which read, "Tell Smith I'm sorry."

Approximately three hours later, Perrock was spotted by state police Trooper Don Cook, who was patrolling the area in his car. Cook was on Coal River Road and Perrock was on the opposite bank of Coal River.

According to Trooper Don Caldwell, Cook radioed in that he had found the boy and while a state police helicopter was on its way to pick him up, Cook persuaded the boy to give himself up.

When found, Perrock had a .22 caliber pistol and a knife, Markham said.

Perrock was returned to the school for questioning, Markham said, because his mother was there waiting for him and he needed a dry set of clothes.

Smith had been arrested on a juvenile charge for arson in December in connection with a bulletin board in the school that had been set afire, Markham said. Fistfights between Smith, Perrock and two other boys had been occurring for the past three weeks, he added. "They had had a fight two or three times," he said. "It was two young boys slapping around on each other."

Mrs. Smith said she was aware of Arthur's problems at school. "I've pleaded with the school and school board officials to get this straightened out," she said. "This is what it's come to. I've talked to people about this going on."

She said she knew of a fued between Smith and Perrock. "He (Arthur) said he wanted to whip him, which most boys would say if they were fighting. He told his daddy that Stuart had threatened him."

After the bulletin board incident, Mrs. Smith said she had got the papers and planned to borrow money to send Arthur to a Christian school. "But he said he wanted to go to Hayes because all his friends were there.

"He was well-liked. People came by all last evening that he had been good friends with. We didn't even know all of them. A lot of them had never met Arthur either, they just talked to him on the CB."

The Smith family lives several miles from the school on Coal River Road and Arthur's grandmother, Icy Deweese, lives in a trailer behind the home. On Thursday, Mrs. Deweese said they lived next door to the school. "She was so upset she got things confused," Mrs. Smith said.

The Smith home has stereo and radio speakers in almost every room, she said, because working on the radio and stereo were among his hobbies. "He loved music, mostly

hard rock. His favorite groups were Styx and Lynyrd Skynyrd but he liked all of it, except he wasn't much for country and western."

Mrs. Smith said she and her husband prefer country-western music, so they often teased their son about his musical !!!!!

"He was always working on someone's bike, too," she said. "He had a motorcycle he's been riding for three years. Last year the motorcycle broke down and he went back to riding his 10-speed."

Arthur has gone hunting with his father ever since he could walk, she said. "He loves to hunt. The winter before last, he caught a deer around here. He saved up his money when he was 10 years old to buy his first gun. He had a rifle and a shotgun. His father taught him how to use it.

"It's kind of ironic because he was shot. But he was always very cautious with his gun. He wasn't allowed to come back out of the woods with it loaded. He always knew the safety measures."

Mrs. Smith said she didn't know what she'd do now that her youngest boy is gone. "I just know I lost my son," she said.

Surviving Smith are his parents, Mr. and Mrs. Frazier Smith of St. Albans; brothers, Denziel of St. Albans and Wayne at home; grandparents, Mrs. Icy DeWeese of St. Albans, Mr. Homer DeWeese of Hometown.

Friends may call Saturday after 3 p.m. in Casdorph-Curry Funeral Home, St. Albans.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HON. ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, *Respondent.*

Filed April 4, 1978

Petition of Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam for Writ of Prohibition

---

TO THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

The Petitioners allege as follows:

1. The Petitioner, the Daily Gazette Company, is a West Virginia corporation, with its principal place of business in Charleston, West Virginia, and owns and publishes the Charleston Gazette, a morning newspaper distributed throughout the State, and is responsible for the news and editorial content of that paper.

2. The Petitioner, Don Marsh, a citizen, resident and taxpayer of Kanawha County, West Virginia, is, and at all times herein mentioned, was Editor of the Charleston Gazette.

3. The Petitioner, W. E. Chilton, III, is and at all times herein mentioned, was Publisher of the Charleston Gazette.

4. The Petitioner, Leslie H. Milam, is and at all times herein mentioned, was a news reporter for the Charleston Gazette.

5. The Respondent is a Circuit Judge for Kanawha County.

6. The attached indictment was returned by the Kanawha County Grand Jury during the January, 1978 term of court.

7. At 10:30 o'clock a.m. on the day of the shooting, Leslie Milam was contacted by Don Marsh who instructed him that a shooting had taken place at Hayes Junior High School in St. Albans and assigned him to cover the story.

Milam went to Hayes Junior High School and obtained the story. Perrock's name was given to him by one of the policemen attending the accident.

Although Milam was aware of the statutory proscription against publication of juvenile names, he discussed the prospect of publication of Perrock's name with Chilton and Marsh and, since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statute.

The name appeared in the next days issue, a part of which is attached hereto as Exhibit A.

8. Upon information and belief that unless prohibited by this Court, Respondents will proceed, without jurisdiction, to bring your Petitioners to trial pursuant to a void indictment based on a void statute. No West Virginia court other than the Supreme Court of Appeals of West Virginia has jurisdiction to issue a Writ of Prohibition against a Judge of the Circuit Court of Kanawha County.

9. The petitioners did not obtain a court order before publishing Perrock's name since the statute which ordered such compliance is an unconstitutional restraint on the petitioners' right to free speech.

10. The petitioners submit that the indictment returned against them by the Grand Jury of Kanawha County is

null and void and that, due to its constitutional deficiency, the respondents should be prohibited from proceeding against them on such indictment.

11. The indictment is unconstitutional in that it violates:

a) Article 3, Section 7 of the West Virginia Constitution which reads as follows:

> "§ 7. No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

b) Article 5 of the West Virginia Constitution.

c) The First Amendment to the Constitution of the United States, which prohibits the Congress from making any law abridging freedom of speech of the press, made applicable to State action by the Fourteenth Amendment to the Constitution of the United States.

d) The Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

e) Article 3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

12. The Petitioners aver that upon information and belief, the respondents will proceed to try the Petitioners under this indictment that is based on an unconstitutional statute, and that, therefore, their proper remedy is to petition this court for a writ of prohibition pursuant to West Virginia Code § 53-1-1, and that no evidentiary procedures will be necessary.

WHEREFORE, the Petitioners pray:

1. That this Honorable Court issue a rule directing the Respondents to show cause, why such a prohibition should not be granted to the petitioners.

2. That after the respondents have responded to this the Petitioners be awarded the writ of prohibition and that said indictment be declared void and all of this proceeding be expunged from the records of each of the individual Petitioners.

3. That the proceedings in the court below be ordered suspended until this Petition is adjudicated.

4. Such other relief as this court deems necessary and proper.

DON MARSH, W. E. CHILTON, III,
THE DAILY GAZETTE COMPANY, a
corporation, and LESLIE H. MILAM

By Counsel

/s/ RUDOLPH L. DITRAPANO
DITRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia
Counsel for Petitioner

[Certificate of Service deleted in Printing]

[Subscriptions deleted in printing]

No. CR-78-M-6

THE CIRCUIT COURT
OF KANAWHA COUNTY

JANUARY TERM, 1978

STATE OF WEST VIRGINIA

v.

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM

Indictment for Misdemeanor

State of West Virginia, Kanawha County, ss:

IN THE CIRCUIT COURT OF SAID COUNTY:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, the DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY a corporation, and LESLIE H. MILAM, on the 10th day of February, 1973, and prior to the date of the finding of this indictment, in the said County of Kanawha, did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years in The Charleston Gazette, a newspaper of general circulation throughout the said County of Kanawha, in connection with a proceeding and while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock, a child of the age of fourteen years, in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County, against the peace and dignity of the State.

Found at the JANUARY Term of said Court, 1978, upon the information of

Detective David Johnson, KCSD, Charleston, West Virginia

Don Marsh, Charleston, West Virginia

sworn in open Court and sent before the Grand Jury to give evidence to that body.

CLETUS B. HANLEY
Prosecuting Attorney

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HONORABLE ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT COURT OF KANAWHA COUNTY, *Respondent.*

Answer of the Honorable Robert K. Smith, Judge of the Circuit Court of Kanawha County, West Virginia

(1) The Respondent admits the allegations of paragraph one of the petition.

(2) The Respondent admits the allegations of paragraph two of the petition.

(3) The Respondent admits the allegations of paragraph three of the petition.

(4) The Respondent admits the allegations of paragraph four of the petition.

(5) The Respondent admits the allegations of paragraph five of the petition.

(6) The Respondent admits the allegations of paragraph six of the petition.

(7) The Respondent denies the allegations of paragraph seven of the petition, wherein the petitioners allege that... "since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statute."...

(8) The Respondent denies the allegations of paragraph eight of the petition.

(9) The Respondent denies the allegations of paragraph nine of the petition.

(10) The Respondent denies the allegations of paragraph ten of the petition.

(11) The Respondent denies the allegations of paragraph eleven of the petition.

(12) The Respondent denies the allegations of paragraph twelve of the petition.

Wherefore, the respondent prays that the petition filed against him be dismissed and the Writ of Prohibition as prayed for in the petition be denied, with his costs expended.

ROBERT K. SMITH, JUDGE OF
THE CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA

By Counsel

/s/ CLETUS B. HANLEY
CLETUS B. HANLEY, PROSECUTING
ATTORNEY FOR KANAWHA COUNTY,
COUNSEL FOR THE RESPONDENT

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Petitioners,*

v.

HONORABLE ROBERT K. SMITH, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, *Respondent.*

Demurrer to the Answer of the Respondent

The petitioners say that the Answer of the Respondent is not sufficient in law, for the following reason:

That it is not material to the case of the petitioners that petitioners rely on that allegation in paragraph seven of the petition and denied by the respondent that "since the information was already common knowledge, due to the many eye-witnesses, they jointly decided to go ahead and publish Perrock's name without seeking a court order pursuant to the statutes".

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM

By Counsel

/s/ RUDOLPH L. DiTRAPANO
DiTRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East

Charleston, West Virginia 25301

Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

IN PROHIBITION ORIGINAL JURISDICTION

THE STATE OF WEST VIRGINIA AT THE RELATION OF DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Petitioners,*

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. McHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HAY, and THE HONORABLE A. ANDREW MacQUEEN Judges of the Circuit Court of Kanawha County, West Virginia,

and

THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents.*

Demurrer

The Demurrer of the Respondents to the petition of the Petitioners.

The Respondents say that the petition is not sufficient in law, for the following reasons:

(1) Chapter 49, Article 7, Section 3 and 20 of the Code of West Virginia, as amended is not unconstitutional and does not violate Article 3, Section 7, of the West Virginia Constitution; nor Article 5 of the West Virginia Constitution; nor the First Amendment to the Constitution of the United States; nor the Equal Protection Clause of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States; nor Article

3, Section 10 of the West Virginia Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respondents

By Counsel

/s/ Cletus B. Hanley
Cletus B. Hanley, Prosecuting
Attorney for Kanawha County,
West Virginia, Counsel for Respondents

State of West Virginia

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of March, 1978, the following order was made and entered, to-wit:

Prohibition

14158

State of West Virginia ex rel. Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice, and Mary Schnack, *Relators*

v.

The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey. The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A. Andrew McQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents*

On a former day, to-wit, March 7, 1978, came the petitioners, Daily Mail Publishing Co., a West Virginia corporation, Jack Maurice, and Mary Schnack, by Jackson, Kelly, Holt & O'Farrell, F. Paul Chambers, Michael A. Albert, Alvin L. Emch and Daniel L. Larcamp, their attorneys, and presented to the Court their petition and exhibits, with certificate of service, and note of argument in support thereof, praying for a writ of prohibition to be directed against the respondents, The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A.

Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue, directed against The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John Hey, and The Honorable A. Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a.m., on Tuesday, the 16th day of May, 1978, commanding and directing the said respondents to show cause, if any they can, why a writ of prohibition should not be awarded against them as prayed for by the relators in their said petition; and all further proceedings are stayed until further order of the Court.

Service of a copy of this order upon the respondents aforesaid, shall have the same effect as the service of a formal rule. A True Copy.

Attest: (ILLEGIBLE)

Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of April, 1978, the following order was made and entered, to-wit:

PROHIBITION

14180

DON MARSH, W. E. CHILTON, III, THE DAILY GAZETTE COMPANY, a corporation, and LESLIE H. MILAM, *Relators*

v.

HON. ROBERT K. SMITH, Judge of the Circuit Court of Kanawha County, *Respondent*

This day came the relators, Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam, by DiTrapano, Mitchell, Lawson & Field and Rudolph L. DiTrapano, their attorneys, and presented to the Court their petition and exhibit, with certificate of service, and note of argument in support thereof praying for a writ of prohibition to be directed against the respondent, Hon. Robert K. Smith, Judge of the Circuit Court of Kanawha County, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue, directed against Hon. Robert K. Smith, Judge of the Circuit Court of Kanawha County, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a.m., on Tuesday, May 16, 1978, commanding and directing the said respondent to show cause, if any he can, why a writ of prohibition should not be awarded against him as prayed for by the relators in their said petition; and all further proceedings are stayed until the further order of the Court.

Service of a copy of this order upon the respondent aforesaid, shall have the same effect as the service of a formal rule.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of June, 1978, the following order was made and entered, to-wit:

PROHIBITION

14158

STATE OF WEST VIRGINIA EX REL. DAILY MAIL PUBLISHING CO., a West Virginia corporation, JACK MAURICE, and MARY SCHNACK, *Relators*

v.

THE HONORABLE ROBERT K. SMITH, THE HONORABLE THOMAS E. MCHUGH, Chief Judge, THE HONORABLE WILLIAM HERBERT BELCHER, THE HONORABLE PATRICK CASEY, THE HONORABLE ODEN F. GOSHORN, THE HONORABLE JOHN HEY, and THE HONORABLE A. ANDREW MACQUEEN, Judges of the Circuit Court of Kanawha County, West Virginia, and THE HONORABLE CLETUS B. HANLEY, Prosecuting Attorney of Kanawha County, West Virginia, *Respondents*

The Court having maturely considered the petition and exhibits the rule awarded thereon, respondents' demurrer to relators' petition, the argument and briefs of counsel thereon, and the brief Amicus Curiae of Juvenile Defender Attorney Program, is of opinion for reasons stated in writing and filed with the record that the relators are entitled to a writ of prohibition as prayed for in their said petition. It is therefore considered and ordered by the Court that a writ of prohibition do issue, directed to the respondents, The Honorable Robert K. Smith, The Honorable Thomas E. McHugh, Chief Judge, The Honorable William Herbert Belcher, The Honorable Patrick Casey, The Honorable Oden F. Goshorn, The Honorable John

Hey, and The Honorable A. Andrew MacQueen, Judges of the Circuit Court of Kanawha County, West Virginia, and The Honorable Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, restraining and prohibiting them from taking any further action against the petitioners by reason of Indictment No. 85, more fully set out and described in the petition herein, excepting only such order or action as may be appropriate to void said indictment and to restore the criminal records of each of the petitioners to their former status as if said indictment had never been returned; in accordance with the principles stated in the written opinion aforesaid and further according to law.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Caplan, Justice Harshbarger, Miller and McGraw.

The service of an attested copy of this order upon the respondents aforesaid shall have the same effect as the service of a formal writ.

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

BRIEF OF RESPONDENTS, DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

RUDOLPH L. DI TRAPANO
DI TRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia 25301

Counsel for Respondents,

DON MARSH, W. E. CHILTON, III
The Daily Gazette Company,
a corporation, and
Leslie H. Milam

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
PRAYER	1
OPINION BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	10

CITATIONS

CASES:

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963)	7
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	7, 9, 10
Dennis v. *U.S.*, 341 U.S. 494 (1951)	8
Elrod v. *Burns*, 427 U.S. 347 (1976)	8
Lake Country v. *Rollins*, 130 U.S. 662 (1889)	5
Near v. *Minnesota*, 283 U.S. 697 (1931)	4
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	4
Oklahoma Publishing Co. v. *District Court*, U.S. 51 L.Ed. 2d 355 (1977)	9
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975)	7

CONSTITUTIONS:

United States Constitution, First Amendment	2, 3, 4, 6, 7, 8, 9, 10
West Virginia Constitution, Article 3, § 7	2, 5, 6, 10

STATUTE:

West Virginia Code, § 49-7-3	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

BRIEF OF RESPONDENTS, DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

The respondents, Don Marsh, W. E. Chilton, III, The Daily Gazette Company, a corporation, and Leslie H. Milam, respectfully pray that the writ sought herein be denied since the West Virginia Supreme Court of Appeals decided the question involved in accordance with the relevant requirements of the Constitution of the United States, the applicable decisions of this Court, and the Constitution of West Virginia.

OPINION BELOW

The opinion below and on which the Petition is based is set forth in the Appendix to the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment to the Constitution of the United States and to the provisions of West Virginia Code § 49-7-3, both cited in the Petition, Article 3, § 7 of the Constitution of West Virginia provides as follows:

> "No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

QUESTION PRESENTED

In the view of these respondents, the question presented by the Petition is whether, in awarding a Writ of Prohibition against petitioners, the West Virginia Supreme Court of Appeals correctly applied federal constitutional principles in holding that the provisions of West Virginia Code § 49-7-3 violate the First Amendment to the Constitution of the United States as a prior restraint on freedom of the press, and corollarily, whether that statute violates the Constitution of West Virginia.

STATEMENT OF THE CASE

On February 9, 1978, a student at Hayes Junior High School, a part of the Kanawha County public educa-

tional system and located in St. Albans, West Virginia, was murdered, and another student at the school was arrested and charged with the murder. The next day, an article was published in The Charleston Gazette, a daily newspaper in Charleston, West Virginia, about the murder, and the names of the student murdered and the student charged with the murder were both mentioned. Both students were juveniles under West Virginia law, which prohibits the publication, only by newspapers, of the name of any juvenile in connection with criminal proceedings without a written court order.

Subsequently, these respondents were indicted by a Kanawha County Grand Jury for violation of the provisions of West Virginia Code § 49-7-3, and thereupon filed a writ of prohibition with the West Virginia Supreme Court of Appeals, which issued a rule in prohibition. On June 27, 1978, the Court held that the aforesaid provisions of the West Virginia statute were unconstitutional because they violated the First Amendment to the Constitution of the United States by creating a prior restraint on the freedom of the press.

ARGUMENT

The Provisions of West Virginia Code § 49-7-3 Abridge the Federal and State Right of Freedom of the Press by Imposing Upon the Press a Prior Restraint That Is Constitutionally Impermissible, Because the Interest Purportedly Sought to Be Protected by the Relevant Provisions of This Statute Is Not of Sufficient Magnitude to Justify the Imposition of Censorship of the Press.

The statute in question in this case clearly creates a prior restraint upon the freedom of the press as guaranteed by the First Amendment by requiring a court order before the name of a juvenile in a criminal pro-

ceeding may be published by a newspaper. Thus, the real issue is whether, despite the unqualified guarantee of the First Amendment, the statutory prohibition falls into any of the permissible exceptions developed by this Court in allowing imposition of prior restraints upon the press. These respondents submit that no such exceptions are applicable in this case and that the publication in question is protected under the First Amendment.

The exceptions are drastic and well-recognized. Prior restraints may be imposed in such extreme circumstances as to protect military information in time of war and in situations involving obscenity or incitements to violence or revolution by force. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976).

Thus, while this Court has not granted absolute protection under the First Amendment in all circumstances, it has held that any system of prior restraint comes to the Court with a "heavy presumption" against its constitutional validity. *Nebraska Press Association* v. *Stuart, ibid.*

In the instant case, the effect of the statute compelling prior judicial approval before publication is akin to that in *Near* v. *Minnesota, supra,* where this Court held:

> "The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that, at

> any time, the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determination in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be a step to a complete system of censorship."

Nor does the Constitution of West Virginia give the Legislature the authority or power to enact a statute of the kind in question here. Article 3, § 7 of the West Virginia Constitution clearly limits freedom of the press only in the areas of obscenity, libel, and defamation of character. Obviously, publication of a juvenile's name does not fit within any of these exceptions, none of which are obscure or arcane.

The statute clearly abridges freedom of the press; the type of speech that is restrained is not obscene, nor can, in this case, it be classified as libelous or defamatory since it is true, or at least undenied. Therefore, the Legislature has exceeded its clear, plain, and unambiguous constitutional power in enacting this statute.

The principles of constitutional construction support this obvious conclusion in the language of this Court in *Lake Country* v. *Rollins,* 130 U.S. 662 (1889):

> "To get the thoughts or meaning expressed in a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no ab-

> surdity nor any contradiction of the parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

It is respectfully submitted that the publication of the name of the fifteen year old juvenile in connection with his arrest for the killing of a classmate in a public school is necessarily a right guaranteed by the State Constitution, as well as the United States Constitution, a right to publish and a right of the public to know. No permissible inference from the carefully worded exceptions dealing with obscenity, libel, and defamation can be made to inhibit the press from publishing the name of the juvenile offender, as desirable as that objective might be in and under some circumstances.

We would respectfully invite the Court's attention that this constitutional provision was adopted by an intelligent and enlightened people who were fully cognizant of the dangers attendant to an inhibited and fettered press. Juveniles were surely among the living in 1863 when West Virginians adopted their Constitution and it can hardly be argued that criminal behavior of the adolescent is an aberration of recent vintage. No such exception was ever contemplated in 1863. And no dramatic changes have occurred affecting social intercourse and the juvenile that constrain reading such a limitation into this provision of either the State or Federal Constitutions.

By giving a governmental official, in this case a judge, the discretion and opportunity to grant or deny a newspaper the permission to publish a juvenile's name, the West Virginia Legislature has created a

classic prior restraint analogous to many which this Court has previously declared unconstitutional. Cf. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975), and the cases cited therein.

One of the most important functions of a newspaper is to keep the public informed of events of public concern as immediately as possible—not days or weeks later. If a newspaper had to retain an attorney to petition a court to schedule a hearing to obtain an order approving publication of a juvenile's name every time a juvenile is arrested and charged with the commission of a felony in a public place—certainly a matter which the public in a given locality has the right and need to know—the value in the public's timely receiving this information would be lost—assuming the judge saw fit to grant the order. As Mr. Justice Douglas, concurring in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), stated, "there is no power on the part of government to suppress or penalize the publication of 'news of the day.' " Nor, these respondents contend, does government have the power, or right, to *delay* publication of the news of the day.

In the instant case, petitioners claim that the State of West Virginia has a valid and substantial interest in maintaining the anonymity of juvenile offenders sufficient to justify impairment of the First Amendment guarantee of freedom of the press; but the burden is on petitioners to establish the sufficiency of this interest because of the reverse presumption of constitutionality on the statute in question. *Southeastern Promotions, Ltd.* v. *Conrad, supra; Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963).

What constitutes a substantial enough interest for the Government to impose a limitation of this kind?

In *Dennis* v. *U.S.*, 341 U.S. 494 (1951), this Court had under consideration the attempt of several individuals, by means of publishing, to overthrow the United States Government in violation of a federal statute. This Court ruled that the individuals were properly and constitutionally convicted, notwithstanding the First Amendment protection extended to publishing, because their attempt, by publishing, constituted a clear and present danger to the Government. A greater governmental interest is difficult to imagine, yet the Court would not have found clear and present danger had the petitioners not intended the overthrow as speedily as circumstances would permit. Thus, the interest protected by the particular statute must be precious, and the potential damage to that interest very severe.

Similarly, in *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Court held in favor of a county sheriff's employees whose jobs were being terminated because they were not affiliated with the Democratic party. The Court found that such a process was an infringement of the employees' First Amendment rights and stated:

> ". . . It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. * * * The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. * * * Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. (citation) The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, . . ."

This Court has addressed itself to the interest that petitioners are attempting to establish in the instant

case. In *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed. 2d 355 (1977), the Court held a prior restraint unconstitutional in a case involving an attempt by the State to keep confidential the identity of an eleven year old juvenile charged with second degree murder. The restraint in that case consisted of an injunction granted by the state court prohibiting news media from publishing the child's name. In its opinion, this Court considered the policy favoring the confidentiality sought by the State for juvenile offenders —the same policy asserted by petitioners in this case— and still held this interest not to be constitutionally sufficient. The rationale of the West Virginia Supreme Court of Appeals in its opinion, at page A-8 of the Appendix to the Petition herein, is relevant at this point:

> ". . . We see little distinction between that case [*Oklahoma Publishing*] and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute while in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt."

Finally, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court was faced with a statute which made unlawful the publication of the name of a rape victim. The Court weighed the free speech interest against the victim's right of privacy and held that the First Amendment right was the greater right, emphasizing the public's right to know:

> "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and conse-

quently fall within the responsibility of the press to report the operations of government."

The *Cox* case was decided on the ground that the public has a right to know the identity of the victim of a crime. How much greater then is the right of the public to know the identity of the perpetrator?

CONCLUSION

These respondents respectfully submit that the petition for a writ of certiorari should be denied since the statute in question clearly effects a prior restraint on the operation of a free press, and, as such, is subject to the heaviest presumption of unconstitutionality, which burden cannot be met since the interest sought to be protected is not of sufficient magnitude to justify such an invasion of First Amendment rights under either the Constitution of the United States or the Constitution of West Virginia.

Respectfully submitted,

RUDOLPH L. DI TRAPANO
DI TRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia 25301

Counsel for Respondents,

DON MARSH, W. E. CHILTON, III
The Daily Gazette Company,
a corporation, and
Leslie H. Milam

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

Case No. 14158 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,
Respondents,

Case No. 14180 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF FOR RESPONDENTS DAILY MAIL PUBLISHING CO., ET AL., IN OPPOSITION

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322
Counsel for Respondents,
Daily Mail Publishing Co., etc., et al.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .. 3

STATEMENT OF THE CASE 4

ARGUMENT 8

CONCLUSION 11

APPENDIX

Test of the Opinion of the Supreme Court of Appeals of West Virginia 1a

CITATIONS

CASES:

Cox Broadcasting Corporation v. *Cohn*, 429 U.S. 469 (1975) 8, 9, 10

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 11

Government of Virgin Islands v. *Brodhurst*, 285 F. Supp. 831 (D.C. Virgin Islands 1968) 9

Landmark Communications, Inc. v. *Commonwealth of Virginia*, 56 L.Ed.2d 1 (1978) 8, 10

Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976) 8

Oklahoma Publishing Company v. *District Court of Oklahoma County, Oklahoma* —— U.S. —— (1977) 8, 9, 10, 11

CONSTITUTION OF THE UNITED STATES:

First Amendment 2, 3, 5, 9, 10, 11, 12

Fourteenth Amendment 3, 4, 9, 11

STATUTES:

West Virginia Code 49-7-3 ..... 2, 3, 4, 5, 7

West Virginia Code 49-7-20 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

Case No. 14158 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,
Respondents,

Case No. 14180 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF FOR RESPONDENTS DAILY MAIL PUBLISHING CO., ET AL., IN OPPOSITION

OPINION BELOW

The opinion set forth in the Appendix to the Petition is not the final opinion of the West Virginia Supreme Court of Appeals but was a draft opinion which was revised by that Court before publication.

The corrected final opinion of the court below is set forth as part of the certified record (R. 34)[1] and in the Appendix to this Brief at 1a. The changes in the final opinion are (i) in the eleventh line from the bottom of page 7a of the Appendix the word "inevitably" has been inserted before the word "recognizing"; (ii) on the same page, third line from the bottom, the word "prior" has been deleted; and (iii) on page 8a, in the next to the last line of the paragraph ending at mid-page, the word "prior" has been deleted before the word "restraint."

JURISDICTION

Respondents do not question the jurisdictional basis set forth in the Petition.

QUESTIONS PRESENTED

The Petitioners state that the sole question to be considered herein is "Whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment . . .", which is a correct statement of the question if the Court's review is to be limited to the rationale expressed in the Opinion below.

However, the Petition for Prohibition below raised additional questions of Constitutional dimensions which were not decided by the Court below[2] but which would have required the same result, *i.e.*, that West

[1] Since Petitioners failed to cause the record in the court below to be filed with this Court, Respondents caused a certified copy of the complete record in Case No. 14158 below to be certified by the clerk of that court and transmitted to the Clerk of this Court. References to the record (R.) will be to the page numbers affixed by the Clerk of the Supreme Court of Appeals of West Virginia.

[2] See fn. 3 to Court's opinion at 9a.

Virginia Code 49-7-3 is violative of the First and Fourteenth Amendments to the Constitution of the United States. These additional questions raised and presented to the Court below were:

First, whether phrased in terms of either "prior restraint" or "subsequent punishment", W. Va. Code 49-7-3 is violative of the First Amendment.

Second, whether by imposing criminal sanctions against "newspapers" only, W. Va. Code 49-7-3 denies Respondents the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Third, whether W. Va. Code 49-7-3, by requiring a newspaper to obtain an order of "the court" before publishing the name of a juvenile involved in a delinquency proceeding without prescribing any standards to guide the court in determining when publication should be permitted or denied, is violative of the First and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States and West Virginia Code 49-7-3 are set forth in the Petition at pp. 2, 3. However, Petitioners failed to include: (1) W. Va. Code 49-7-20 which prescribes the criminal penalties for violation of West Virginia Code 49-7-3 and (2) the relevant provisions of the Fourteenth Amendment.

West Virginia Code 49-7-20:

> "A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically pro-

vided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

Fourteenth Amendment, so far as relevant:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE [3]

The Court below consolidated for decision two separate cases. In one case, these Respondents invoked the original jurisdiction of the Supreme Court of Appeals of West Virginia and sought a Writ of Prohibition against the Judges of the Circuit Court of Kanawha County and the Prosecuting Attorney of that County to prevent further proceedings under a Grand Jury indictment of these Respondents for unlawfully publishing the name of a juvenile in violation of West Virginia Code 49-7-3 (Case No. 14158 below). In the second case, the Daily Gazette Company, publisher of The Charleston Gazette, and individual officers and employees of that newspaper, sought similar relief from prosecution for publishing the name of the same

[3] The Petition for a Writ of Prohibition below was verified (R. 13) and the truthfulness of the facts reported in The Charleston Daily Mail story of February 10, 1978, which was Exhibit D to the Petition for Prohibition was affirmatively pleaded (R. 7). For the purpose of this case, all of the allegations in the Petition for Prohibition below, including the factual statements in Exhibit D thereto, were admitted to be true by the Demurrer to the Petition (R. 25).

juvenile (Case No. 14180 below). In the view of the court below, the cases were consolidated because "both represent a conceptionally indistinguishable permutation of a classic First Amendment . . . issue . . . ."

There are, however, some factual differences in the two cases. Further, Petitioners' Statement of the Case inadequately states the facts material to the consideration of the question presented in their case and is misleading.

Petitioners correctly state that "On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia." Additional facts not included in Petitioners' Statement of the Case include: (1) minutes before classes were to begin three shots from a .22 caliber pistol were fired at close range into Arthur Smith, a 14-year old student, in a hallway at the school killing Smith almost instantly; (2) there were seven eye-witnesses to the homicide; (3) 14-year old Stuart Perrock, the alleged assailant, fled from the school; (4) law enforcement officers attempting to follow Perrock's flight found a message scrawled in the snow which read "Tell Smith I'm sorry;" (5) appoximately three hours after the fatal shooting, Perrock was found and taken into custody after a search involving Sheriff's Deputies, State Police and the use of a State Police helicopter; (6) when found, Perrock had in his possession a .22 caliber pistol and a knife.[4]

[4] Under West Virginia law at that time, a juvenile under the age of 16 could not commit a crime but could only be adjudicated a juvenile delinquent, resulting in a maximum penalty of incarceration in a juvenile center until age 18. Prior to its repeal by c. 65 of the Acts of the West Virginia Legislature, 1977, W. Va. Code 49-5-3 (Michie W. Va. Code Vol. 14, 1976 Replacement

All of the above facts, which were affirmatively pleaded by Respondents and demurred to by Petitioners, are contained in the Charleston Daily Mail story written by the Respondent, Mary Schnack, and published on the afternoon of February 10, 1978 (R. 21). As that news story discloses, the reporter's sources were identified and the material statements attributed to those sources. These sources included Lt. W. T. Markham of the Kanawha County Sheriff's Office, Trooper Don Caldwell of the West Virginia State Police, Chuck Miller, an Assistant Prosecuting Attorney of Kanawha County, and the mother of the slain juvenile, Mrs. Frazier Smith.

The record demonstrates that Respondents obtained their information about the slaying, including the identity of the alleged assailant, from police officials and an assistant prosecuting attorney of Kanawha County. There is no evidence in the record of this case to support the statement in the Petition that Respondents did not obtain Perrock's name by "lawful means or with the State's approval". Petition at 11. The record is conclusive to the contrary.

Volume) provided that if a juvenile committed an act which if committed by an adult would be a capital offense, the juvenile court had no jurisdiction. After the 1977 legislative enactment any offense committed by a juvenile under the age of 16, no matter how serious, was only an act of juvenile delinquency. Acts of the West Virginia Legislature, First Extraordinary Session 1977, c. 6 amending and reenacting W. Va. Code 49-5-10. Following the slaying of Arthur Smith, which gave rise to this case, the West Virginia Legislature, in its Regular Session, 1978, on March 11, 1978, amended and reenacted W. Va. Code 49-5-10 to permit, under certain circumstances, a transfer from the juvenile to criminal court jurisdiction of certain specified felonies, even though the juvenile be under the age of 16 years. Acts of the West Virginia Legislature, 1978, c. 14.

Although the slaying of Smith occurred early in the morning of February 9, 1978, and these Respondents were aware that Perrock had been taken into custody as the alleged slayer prior to the writing of the story about the homicide which appeared in the Charleston Daily Mail on the afternoon of February 9 (R. 17), Respondent editor Maurice decided not to use Perrock's name in the story because of the prohibition contained in W. Va. Code 49-7-3. As a result, the Daily Mail story which was published on the afternoon of February 9, and is reproduced in full in the record (R. 17), did not use Perrock's name. However, early on the morning of February 10, as the news and editorial staff of the Daily Mail (an afternoon newspaper) reported for work, these Respondents knew that it was already public knowledge that Perrock had been taken into custody as the alleged slayer of Smith. It was known to Respondents that Perrock's name had been published as the alleged slayer by Charleston radio station WCHS on February 9, by Charleston radio stations WCAW and WVAF in the early morning of February 10, and in a front page story in Charleston's morning newspaper, The Charleston Gazette, on February 10, the latter story and accompanying column and photograph being set forth in full in the record (R. 18, 19, 20). Faced with the fact that the identity of the alleged slayer of Smith was then public knowledge, Respondent Maurice determined that the Daily Mail should publish Perrock's name. The Daily Mail on February 10, 1978, without first applying for an order from the Circuit Court of Kanawha County permitting publication of Perrock's name, published the story (R. 5, 6, 7, 21) which gave rise to the indictment of these Respondents. A copy of the indictment returned against these Respondents appears in the record (R. 15, 16).

ARGUMENT

The narrow issue involved in this case is the right of the two daily newspapers in Charleston, West Virginia, to truthfully publish the name of a juvenile who the newspapers had learned through interviewing law enforcement officers and an assistant prosecuting attorney was alleged to have committed a homicide in one of the area schools. This case does not involve a broad constitutional challenge to the State's powers to keep juvenile proceedings and the names of juvenile defendants confidential or to punish someone who secures information about such proceedings by illegal means and thereafter divulges it. Nor, does this case involve any claimed constitutional right of access by the press to information regarding juvenile proceedings or records.

As such, this case is neither novel nor so important as to warrant review by this Court. While Petitioners may be correct in asserting that the Court has not ruled on the precise facts of this case, its prior decisions make clear that, even assuming that the State may deny access to government records or proceedings, it may not prohibit or punish the truthful publication of information regarding such records or proceedings once that information is obtained by the press unless the substantive evil occasioned by such publication is "extremely serious and the degree of imminence extremely high." *Landmark Communications, Inc.* v. *Virginia,* —— U.S. —— (1978). Moreover, as is also clear from the Court's decisions in *Oklahoma Publishing Co.* v. *District Ct.,* 430 U.S. 308 (1977), *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), and *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1972), any attempt to suppress, either by prior restraint or subsequent punishment, the publication of facts and events which are revealed by public officials violates "settled principles" of constitutional law.

In *Oklahoma Publishing Co.,* for example, this Court held that a trial court's order enjoining the publication of a juvenile defendant's name and picture, which were legally obtained, was an abridgment of the freedom of the press guaranteed by the First and Fourteenth Amendments. In that case, a railroad switchman was fatally shot by an eleven-year-old boy. After a hearing attended by representatives of the media, at which the juvenile was formally charged with delinquency, a number of stories using the boy's name and photograph appeared in the local newspapers. Subsequently, the trial court entered a pre-trial order prohibiting further publication of the juvenile's identity. In striking down the trial court's order, this Court noted that there, as here, there was "no evidence that petitioner acquired the information unlawfully." According to the Court, this, coupled with the fact that the juvenile's name was a matter of public knowledge, rendered the trial court's action clearly invalid.

Petitioners' attempt to distinguish the Court's decision in *Oklahoma Publishing Co.,*[5] as well as the Court's earlier decision in *Cox Broadcasting,*[6] on the grounds

[5] While attempting to distinguish this Court's reversal of the State Supreme Court in *Oklahoma Publishing Co., supra,* Petitioners, like the Oklahoma state court, rely primarily on *Government of Virgin Islands* v. *Broadhurst,* 285 F.Supp. 831 (D.C. Virgin Islands, 1968), the reasoning in which this Court inevitably considered and found unpersuasive.

[6] In *Cox Broadcasting,* this Court held that a state could not impose sanctions on the accurate publication of a rape victim's name "which was publicly revealed in connection with the prose-

that the information published in those cases was obtained with the acquiescence of the Court in *Oklahoma* and from a public record (indictment) in *Cox*, while Respondents in the instant case learned the identity of the juvenile defendant through interviews with local law enforcement officers and an assistant prosecuting attorney. Such a distinction is, however, clearly too tenuous to be of any significance.

That First Amendment protections are not limited to accurate information obtained with the acquiescence of a court or from a public "record" is implicit in this Court's recent decision in *Landmark Communications, Inc.* v. *Virginia,* —— U.S. —— (May 1, 1978). There, the Virginian Pilot published, in violation of Virginia law, accurate information regarding the identity of a judge being investigated in a proceeding of the Virginia Judicial Inquiry Commission for which confidentiality was mandated by the Virginia Constitution. In striking down the Virginia statute under which Landmark Communications, Inc., the owner of the Virginian Pilot, was prosecuted for publishing that information, this Court addressed itself solely to the narrow question of whether the First Amendment permits the criminal prosecution of third persons who are strangers to an inquiry from publishing truthful information regarding a confidential proceeding. In ruling that the criminal statute, as applied to Landmark, was violative of the First Amendment, the Court did not concern itself with how the Virginian Pilot learned the identity of the judge being investigated.

---

cution of the crime." 420 U.S. at 471. There a reporter learned the identity of the victim from an examination of indictments.

Based upon the foregoing then, it is clear that the West Virginia Supreme Court of Appeals in rendering its decision below correctly applied this Court's decisions cited above.

The decision below does not represent a significant expansion of existing legal principles and does not warrant review by this Court.

Even if the Court were to grant the petition for writ of certiorari, the decision of the West Virginia Supreme Court of Appeals is clearly sustainable on other well-established federal constitutional grounds which, while raised below and in Respondents' Statement of the Questions Presented, were not addressed in the opinion below. The statute in question is on its face violative of the First and Fourteenth Amendments as a denial of equal protection because it imposes criminal sanctions against newspapers only (without any attempt to proscribe publication by any other printed media or by radio or television) and because it is overly broad and bears no reasonable relation to a valid state interest. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

CONCLUSION

This Court held in *Oklahoma Publishing Company:*

> "No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. *There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were 'publicly revealed in connection with the prosecution of the crime'* much as the name of the rape victim in Cox Broadcasting was placed in the

public domain. Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments." 430 U.S. at 311, 312.

Based on that holding and the other decisions of this Court cited herein interpreting and applying the free press guarantee of the First Amendment, certiorari should be denied.

Respectfully submitted,

DAILY MAIL PUBLISHING CO.,
JACK MAURICE AND MARY SCHNACK

By Counsel

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322

Counsel for Respondents

APPENDIX

NO. 14158

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.

v

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.

NO. 14180

DON MARSH, ET AL.
THE DAILY GAZETTE CO., ETC., ET AL.

v

HON. ROBERT K. SMITH, JUDGE, ETC.

In Prohibition — Writ awarded.

Neely, Justice

1. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.

2. To the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code*, without the prior approval of the trial court, *W. Va. Code*, 49-7-3 [1941] is unconstitutional as repugnant to the First Amendment to the *Constitution of the United States* because it creates an impermissible prior restraint on the freedom of the press.

Neely, Justice:

These two cases, which have been consolidated for

decision, both present a conceptionally indistinguishable permutation of a classic First Amendment, freedom-of-the-press issue concerning prior restraint on publication which the United States Supreme Court has addressed numerous times in the last ten years. These original jurisdiction proceedings seek to prohibit the respondent judges of the Circuit Court of Kanawha County, and the Prosecuting Attorney of Kanawha County from prosecuting petitioners under *W. Va. Code*, 49-7-3 [1941] which forbids any newspaper from publishing the name of a child in connection with any juvenile proceeding without the permission of the trial court. The petitioners are the *Charleston Gazette;* its Publisher, W. E. Chilton, III; its Editor, Don Marsh; one of its reporters, Leslie H. Milam; *The Charleston Daily Mail;* its Editor, Jack Maurice; and one of its reporters, Mary Schnack.

On 10 February 1978 both newspapers printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The respondent prosecuting attorney sought and obtained indictments against petitioners on 1 March 1978 for knowingly and unlawfully violating *Code*, 49-7-3 [1941]. That statute provides:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

Petitioners urge that *W. Va. Code*, 49-7-3 [1941] violates *W. Va. Const.*, art. 3, § 7, which is the state counterpart to the First Amendment to the *Constitution of the United States.* While ordinarily a constitutional question would be decided on state grounds in the first instance, thus avoiding a needless federal question, we find that in this instance it is better practice to rely upon a well developed body of federal law rather than an essentially nonexistent body of state law. Our regular use of state constitutional provisions is grounded in their capacity to be broader, in the sense of being more protective of individual rights, than the federal constitution; however, with regard to the First Amendment it would be diffiicult to find a more expansive interpretation of freedom of the press than that developed by the Supreme Court of the United

States. Even if we were to hypothesize that a broader guaranty might one day be necessary, it would be unwise to formulate new rules in the context of cases whose facts do not compel a minute inquiry into the sagacity of the new rules urged upon us. Furthermore, it is more serviceable to use federal law because of the interrelationship among all of the various news media, some of which are primarily governed by federal law, thereby providing a uniform resolution of these issues throughout the United States.

Recent cases demonstrate that the United States Supreme Court is concerned with all cases involving the First Amendment and that they are regularly responsive to the need for daily supervision of this area of the law throughout the United States. Accordingly in the interest of comprehensibility and uniformity we decide this case according to crystal clear principles of federal law concerning freedom of the press.

I

The preeminent rule with regard to prior restraint on free speech has recently been articulated by the Chief Justice of the United States in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), citing with approval *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971):

> Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.

An exegesis of the reasoning of the Supreme Court of the United States with regard to the issue of prior restraint is hardly appropriate here since that Court has done it in substantial length themselves in numerous cases involving this very issue.[1]

---

[1] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (denying use of municipal facilities for a play production based on city board's judgment of content is an impermissible prior restraint); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (court order barring newspaper from referring to sex in employment headings not prior restraint endangering free speech; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 1969) (overbroad parade permit requirements unconstitutional); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968) (injunction against a public meeting, granted without a hearing, constitutes an unconstitutional prior restraint); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (motion picture censorship statute unconstitutional); *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (system of informal censorship of books held unconstitutional); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (denial of a film license on basis film was "sacrilegious" unconstitutional); *Niemotko* v. *Maryland*, 340 U.S. 268 1951) lack of standards in license-issuing practice for city park use makes the practice a prior restraint in contravention of the 14th Amendment). *Grosjean* v. *American Press Co.*, 297 U.S. 233 1936) (invalidating discriminatory tax on press as an impermissible prior restraint). In addition to these are the cases of *Landmark Communications, Inc.* v. *Commonwealth of Va.*, U.S. , 56 L. Ed.2d 1 (1978); *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L. Ed.2d 355 (1977); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) and *Near* v. *Minnesota*, 283 U.S. 697 (1931) which are discussed in the text of this opinion.

Although the Supreme Court has never taken an absolutist position that there can be no abridgment of the freedom of the press under any circumstances, it would appear that outside of the area of pornography there is no governmental interest sufficiently compelling to justify a prior restraint in times of peace. We suspect, although we cannot prove, that the Supreme Court would authorize a prior restraint with regard to publication of military intelligence in a time of serious national peril and concerning a dangerous and indispensable operation such as the Allies' invasion of Normandy in 1944. A relatively concise statement of the two well recognized exceptions to absolute freedom from prior restraint was stated in *Near* v. *Minnesota*, 283 U.S. 697 (1931) and cited with approval by Justice Brennan in his concurring opinion in *Nebraska Press Assn., supra*, as follows: (1) to prevent the disclosure of information that would inevitably, directly, and immediately cause irreparable damage to the Nation in time of war; and (2) to suppress expression which is simply not deemed "speech" within the meaning of the First Amendment, such as obscenity or incitements to violence or revolution by force. In addition to these two exceptions discussed by Justice Brennan, it appears that with regard to acts which are verbal in nature, as for example a parade, a third exception is the regulation of the time, place and manner of expression, without unduly limiting the opportunity for expression. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

II

It is inevitable that if the Supreme Court takes something less than an absolutist position that all those

who seek to impose prior restraint upon the press will attempt to bring themselves within the exceptions. So it is in these cases that the State of West Virginia argues that a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice, are sufficiently compelling to permit the statute under review to withstand constitutional scrutiny. We disagree with this conclusion because the Supreme Court of the United States has uniformly held over the past ten years that similar legitimate state and private interests were not sufficiently compelling to permit a prior restraint. The case of *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed.2d (1977) leaps instantly to mind in this regard. In that case an Oklahoma statute provided for juvenile proceedings to be held in private and for juvenile records to be open to public inspection only by order of the court. A state court enjoined news media from publishing the name or photograph of an eleven year old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second degree murder. The Supreme Court, inevitably recognizing all of the beneficent purposes to be served by confidentiality held the prior restraint unconstitutional. We see little distinction between that case and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt.

If there were any doubt about restraint after *Oklahoma Publishing*, it was laid to rest in *Landmark Communications, Inc.* v. *Commonwealth of Va.*, *U.S.*

, 56 L.Ed.2d 1 (1978) where the Commonwealth of Virginia attempted to subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before state judicial review commissions. The Supreme Court recognized the legitimate state interest to be served by secrecy, namely "the confidentiality requirement can be said to facilitate the work of the commission in several practical respects. When removal or retirement is justified by the charges, judges are more likely to voluntarily resign or retire without the necessity of a formal proceeding if the publicity which would accompany such proceeding can thereby be avoided." Nonetheless the Supreme Court found that the integrity of government by free discussion would be jeopardized by this particular restraint and invalidated the statute.

Finally, in the case of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975) the Supreme Court held that a Georgia tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim (which was a matter of public record) was an unconstitutional restraint in spite of the legitimate state interest in protecting innocent vicims from embarrassment.

The Supreme Court over the past 50 years has had briefed before them every conceivable First Amendment issue by the ablest and most agile legal minds of this century; nonetheless, after repeated, well-considered, and apparently agonizing evaluation of the issues involved, that Court has concluded that a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent

operation of a democratic society.[2] While it makes no difference whether we agree with them, we gratuitously add that we do. Accordingly we find that to the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code* it is repugnant to the First Amendment to the *Constitution of the United States* as a prior restraint on the freedom of the press.[3] Accordingly the writs of prohibition for which petitioners pray are awarded.

Writ awarded.

[2]*See*, for example, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) involving the famous "Pentagon Papers" during the Vietnam War. Counsel on all sides were among America's most eminent.

[3]As we have resolved this issue on broad First Amendment grounds, we find it unnecessary to reach the issue of whether *W. Va. Code*, 49-7-3 [1941] unconstitutionally discriminates against newspapers; is unconstitutional when seeking to sanction acts which could not endanger the legitimate state purposes sought to be achieved; or, violates the *West Virginia Constitution* because the title of Chapter 65, *Acts of the Legislature*, Regular Session 1977 failed to set forth in the title to the act the fact that such act was making it a crime to publish the name of the child accused of a capital offense.

Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL, ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.
Respondents,

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents.

BRIEF OF THE PETITIONERS

CHAUNCEY H. BROWNING
Attorney General of West Virginia

CLETUS B. HANLEY
Special Assistant Attorney General

BETTY L. CAPLAN
Special Assistant Attorney General

State Capitol, Room E-26
Charleston, West Virginia 25305

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
PRAYER	1
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
ARGUMENT	6
West Virginia Code 49-7-3 is not violative of the First Amendment to the Constitution of the United States in that it does not create an impermissible prior restraint on the freedom of the press	6
CONCLUSION	17

CITATIONS

CASES:

Breed v. *Jones*, 421 U.S. 519 (1975)	13
Cox Broadcasting Corporation v. *Cohn*, 420 U.S. 469 (1975)	7, 14
Government of Virgin Islands v. *Brodhurst*, 285 F. Supp. 831 (D.C. Virgin Islands 1968)	7, 8
In Re Gault, 387 U.S. 1 (1967)	8, 12
In Re Winship, 397 U.S. 358 (1970)	13
Kent v. *United States*, 383 U.S. 541 (1966)	12
Landmark Communications, Inc. v. *Commonwealth of Virginia*, 56 L. Ed. 2d 1 (1978)	16
McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971)	13

Page

Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976) 7, 14

Oklahoma Publishing Company v. *District Court of Oklahoma County, Oklahoma*, 555 P. 2d 1286 (Okla. 1976) 10

Oklahoma Publishing Company v. *District Court of Oklahoma County, Oklahoma*, —— U.S. ——, 51 L. Ed. 2d 355 (1977) 7, 11

State ex rel. Harris v. *Calendine*, 233 S.E.2d 318 (1977) 15

Thornhill v. *State of Alabama*, 310 U.S. 88, 84 L. Ed. 1093 (1940) 8

UNITED STATES CONSTITUTION:

First Amendment 2, 6

STATUTES:

18 U.S.C. 5038 14

28 U.S.C. 1257 (3) 2

West Virginia Code 49-7-3 ..... 2, 3, 6, 14, 15, 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL, ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.
Respondents,

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents.

BRIEF OF THE PETITIONERS

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on June 27, 1978.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of Appeals and the case is unofficially reported in 248 S.E.

2d 269 (1978). The opinion is set forth in full in the Appendix of the Brief for Respondents Daily Mail Publishing Co., et al., in opposition.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on June 27, 1978 and the Appellate Term of the Court below ended on July 14, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

West Virginia Code 49-7-3:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

QUESTION PRESENTED

The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia. The alleged assailant was a fourteen year old student, who was taken into custody and at a hearing in the Circuit Court of Kanawha County later that day was adjudged a delinquent. On the morning of February 10, 1978, a story appeared on the front page of the "Charleston Gazette" by Leslie H. Milam, Reporter, naming the alleged assailant in violation of West Virginia Code 49-7-3. Said statute forbids the publication of the name of a child in connection with any proceeding in a newspaper without a written order of the Court. In the same issue an editorial appeared on the editorial page of that paper written by Don Marsh, editor, which read in full as follows:

> "Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St.

Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.

It is against the law to publish names of juveniles charged with crimes in West Virginia. When we decided to use Perrock's name, we decided to break the law.

Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?

I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.

I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.

On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years—until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.

This is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal). Perhaps those of us

who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. *Maybe the decision was simply wrong.*

But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic fiction for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect," when we report on the youngster who is charged.

My opinion was part of the consensus to use the name. I think *one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required.* As an example, I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.

However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as the courts allow. (Emphasis Supplied).

Respondent, "The Charleston Daily Mail", published the juvenile's name in relation to the shooting in the February 10, 1978 edition of the newspaper. Thereafter, at the January 1978 Term of the Kanawha County Grand Jury, the respondents were indicted for misdemeanors for violating the above code section.

Both respondents filed petitions for a writ of prohibition with the Supreme Court of Appeals of West Virginia. On March 13, 1978, the Supreme Court issued a rule in prohibition making both cases return-

able on May 16, 1978. Thereafter, on June 27, 1978, the Court held that West Virginia Code 49-7-3 was unconstitutional as violative of the First Amendment to the Constitution of the United States because it created an impermissible prior restraint upon the freedom of the press.

It is from the judgment of the West Virginia Supreme Court of June 27, 1978, that petitioners sought review by writ of certiorari, which was granted on November 13, 1978. In the Brief for the Respondents Daily Mail Publishing Co., et al., In Opposition, it was stated that the record demonstrates that respondents obtained their information about the slaying, including the identity of the alleged assailant, from police officials and an assistant prosecuting attorney of Kanawha County. We can find nothing in the pleadings, record or exhibits that disclose that respondents received information concerning the slaying, including the identity of the alleged assailant from an assistant prosecuting attorney of Kanawha County.

ARGUMENT

West Virginia Code 49-7-3 Is Not Violative of the First Amendment to the Constitution of the United States in That It Does Not Create an Impermissible Prior Restraint on the Freedom of the Press

West Virginia Code 49-7-3 provides that with regard to any proceedings under that chapter, the name of a child shall not be published in any newspaper without an order of the court. Respondent newspapers deliberately violated the statute.

While this Court has discussed the issue of prior restraint on many occasions, the Court has never addressed the question under the facts presented. The

"public record" rationale of *Cox Broadcasting Company* v. *Cohn,* 420 U.S. 469 (1975), *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976) and *Oklahoma Publishing Company* v. *District Court,* ..... U.S. ....., 51 L. Ed. 2d 355 (1977), is not applicable here inasmuch as the child's name was not obtained from any public record or proceeding.

It is well established with this Court that First Amendment rights are not absolute, nor can prior restraints never be employed. *Nebraska Press Association,* supra. Petitioners submit that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight when considered in light of the interest that the statute seeks to protect, ie. a child's anonimity.

While not a decision by this Court, Petitioners would urge that the reasoning in the case of *Government of Virgin Islands* v. *Brodhurst,* 285 F.Supp. 831 (D. C. Virgin Islands, 1968) in which this issue was decided, be considered and adopted. There an appeal was taken by the publisher and managing editor of a newspaper who had been convicted and fined for violation of a statute which prohibited the publication of the name of a juvenile without an order from the court. The defendants argued that such a restraint was only permissible where a clear and present danger was involved and that publication of a juvenile's name in the newspaper was not a sufficient interest which would justify curtailing the liberty of the press. The Government responded that the legislature had acted within its power in providing that a child's welfare necessitated that they be cloaked with complete anonimity while subject to the court's jurisdiction. Moreover, the statute provided a means by which court authorization

would be obtained to permit publication of a child's name.

In discussing the issue of freedom of the press the court quoted from *In re Gault*, 387 U.S. 1, 25 (1967):

> "In any event, there is no reason why, consistently with due process, a state cannot continue, if it deems appropriate, to provide and to improve provision for confidentiality of records of police contacts and court action relating to juveniles."

This Court has not retreated from the above view. Petitioners in the case at bar contend that it follows that a provision to enforce compliance with the provisions for confidentiality may also be legislated.

The court in *Government of Virgin Islands*, supra, recognized that:

> "It is not easy to define the permissible limitations on the constitutional right or to derive from the decisions generally applicable standards. While it is settled that the constitutional rights of freedom of speech and of the press embrace the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, it remains true that where the line is to be drawn in a particular case does not rest on generalities but rather on the concrete clash of particular interests and the community's relative evaluation, both of these interests and of how the one will be affected by a specific restriction and the other by its absence." (p. 837).

Quoting from *Thornhill* v. *State of Alabama*, 310 U.S. 88, 84 L. Ed. 1093 (1940), the Court further stated:

> "It is imperative that when the effective exercise of these rights is claimed to be abridged, the

> courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (p. 837).

The Court then determined that:

> "Any attempt to restrict those liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (p. 837).

The Virgin Island Court held:

> "The 'clear and present danger' rule is not a mechanical test applicable in every case touching First Amendment freedoms, without regard to the context of its application." (p. 838).

Moreover, the court stated:

> ". . . when the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively slight and the public interest to be protected is substantial, *a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.* When particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (p. 838) (Emphasis supplied).

The Court then held that the advantages accomplished by the shielding of the names of juveniles from publicity out-weighed those gained by allowing the publication of the names of children. The limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders.

Further, the court held that inasmuch as the defendants could have sought a court order to publish the juveniles' names, that the legislative intent was not an absolute prohibition, but it was properly left to the court's discretion as to whether the disclosure would serve any public interest.

In the case of *Oklahoma Publishing Company* v. *District Court of Oklahoma County, Oklahoma,* 555 P. 2d 1286 (Okla. 1976), the State Supreme Court discussed the advantages of having a juvenile's identity remain anonymous. An eleven year old boy was arrested and charged with delinquency because of the alleged commission of second degree murder. His name and picture were published by the petitioner, and subsequently the trial court issued an order enjoining the news media from using his name or picture. Petitioner then brought an action for writs of prohibition and mandamus.

Under the Oklahoma statute detention hearings are to be held in private unless the judge specifically orders the hearing to be held in public. 10 O.S. 1971 § 1111.

The Court presented the conflicting interests as follows:

> "The argument for requiring juvenile proceedings to be confidential is that: exposure of a juvenile's record of delinquency would be likely to cause impairment of rehabilitative goals of the juvenile correction procedures which might encourage the juvenile offender to commit further acts of delinquency; cause the juvenile offender to lose employment opportunities, or otherwise suffer unnecessarily; bring undue humiliation upon his family because of his youthful transgressions; and

> that publicity may afford the hard core delinquent the kind of recognition he desires. The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceeding could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of denial of the right of press to unrestrainedly gather the news." (p. 1292)

The state court concluded that the restraint on the press in being precluded from publishing a juvenile's name was valid in light of the interest in the possible rehabilitation of the offender and his subsequent integration into society.

This Court reversed the Oklahoma Court on the ground that even though the trial judge had not specifically ordered the detention hearing to be open to the public, members of the press were in fact present at the hearing with the knowledge of the judge, the prosecutor and defense counsel, and no objection was made. Therefore, the Court held that the press could not be enjoined by a court order from publishing the juvenile's name and picture inasmuch as the name had been revealed during a "public" proceeding. *Oklahoma Publishing Company* v. *District Court,* 51 L. Ed. 2 355 (1977). The Oklahoma statute was not declared unconstitutional as being a prior restraint as was held by the West Virginia Supreme Court in this case.

Such is not the situation in the case at bar. The respondents did not obtain the youth's name from any public record or hearing. Nor was his name gotten by lawful means or with the State's approval. It was

obtained through their own investigation, and then, respondents flagrantly violated the law by publishing the juvenile's name and picture.

Petitioners assert that the reasoning set forth in *Oklahoma Publishing Company, supra,* by the Oklahoma Supreme Court regarding the balancing of the probable effects of the statute upon the right of the freedom of the press against the advantages accruing to the juvenile is applicable to the present case.

As previously stated, this Court has determined that a State in furtherance of its policy toward juveniles may provide for the confidentiality of proceedings and records of youthful offenders. *In re Gault,* 387 U.S. 1 (1967). At page 24 of the *Gault* opinion, Justice Fortas speaking for the Court recognized the unique nature of juvenile proceedings and stated "* * * it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' "

This Court has decided other cases in which the Court noted that the unique nature of juvenile proceedings need not be destroyed when various due process safeguards are imposed on the juvenile court system. In *Kent* v. *United States,* 383 U.S. 541 (1966), the Court held that a juvenile must be afforded due process during transfer proceedings. The Court also stated:

> "The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge." (pp. 554-555.)

Further, the Court held that under statutory schemes:

> "[t]he Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, *shielded from publicity.* He may be confined, but with rare exceptions he may not be jailed along with adults." (p. 556.) (Emphasis supplied.)

In *In re Winship,* 397 U.S. 358 (1970), this Court reiterated that it had no desire to change the juvenile system's basic premise of rehabilitating rather than imposing criminal sanctions. While imposing the further due process requirement that the burden of proof in a juvenile proceeding must be beyond a reasonable doubt, the Court again approved the confidentiality of juvenile proceedings. At page 366, the Court opined:

> "Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, *and that juvenile proceedings are confidential.*" (Emphasis supplied.)

In *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971) and *Breed* v. *Jones,* 421 U.S. 519 (1975), this Court

again recognized the uniqueness of the juvenile system and that its purpose was rehabilitation not to turn the proceedings into adversary battles.

As stated above, this Court has not reached the issue raised by the facts in the case at bar. In fact, this Court has expressly refrained from deciding questions involving state policy which denies the public and the press access to juvenile records. *Cox Broadcasting Corporation* v. *Cohn, supra; Nebraska Press Association* v. *Stuart, supra.* However, based upon the attitude of this Court as shown in the above-cited cases, petitioners submit that, while seeking to improve the juvenile system, the Court does not and should not desire to destroy any of the beneficial aspects of the juvenile system, such as shielding the child from publicity. The purpose of the juvenile system should be to rehabilitate.

Similar legislation regarding the nonpublication of a juvenile offender's name has been passed by Congress. 18 U.S.C.A. § 5038, reads in part:

> "(d) Unless a juvenile who is taken into custody is prosecuted as an adult * * *.
>
> "(2) Neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding."

Code 49-7-3 does not preclude the press from publishing the circumstances surrounding an event such as we have here. The statute states only that a child's name shall not be published. Therefore, the press can still be the watchdog of the system and report matters of public interest.

The State of West Virginia through the legislature and the courts has adopted a policy of rehabilitation for juveniles, and for the confidentiality of proceedings and record of youthful offenders. West Virginia Code 49-5-1 (d) and 49-7-1 (as amended 1977). In *State ex rel Harris* v. *Calendine,* 233 S. E. 2d 318 (W. Va. 1977), Justice Neely discussed at length the State's policy toward juveniles. Although the decision spoke of the rights of status offenders, comments found in the opinion apply to all juvenile offenders, especially in light of the 1977 Amendments to the juvenile law that a juvenile may no longer be transferred to adult court. It should be noted that should Code 49-7-3 be declared unconstitutional the press would be allowed to publish not only the names of those youths charged with delinquency because of the commission of violent criminal offenses, but also those charged with delinquency as status offenders. For example, a youth who has been habitually absent from school without good cause (Code 49-1-4(4), as amended 1977) could be proceeded against under Chapter 49 and his name published the newspaper. What public interest arises there? In balancing the interests between the freedom of the press and the juvenile's interest in anonimity, petitioners contend that clearly the juvenile's interest and the state's interest in protecting the youth outweigh the public's right to know the juvenile's name.

As Justice Neely stated in *Harris,* supra:

> "Furthermore, the status offender is inherently in a different class from the criminal offender. The Legislature could choose to punish children guilty of criminal conduct in the same manner as it punishes adults, but *as a matter of public policy* the Legislature provided instead for a comprehensive system of child welfare. *The aim of this sys-*

> *tem is to protect and rehabilitate children, not to punish them.*" (p. 325) (Emphasis Supplied).

Moreover,

> "Since the class to which status offenders belong has been created under authority of the State's inherent and sovereign parens patriae power, *Warner Bros. Pictures* v. *Brodel,* 179 P.2d 57 (Cal. App 1947); *Johnson* v. *State,* 18 N. J. 422, 114 A. 2d 1 (1955), and not under the plenary powers of the State to control criminals, *Barker* v. *People,* 2 Cow. (N.Y.) 686 (1824), status offenders must be treated in a fashion consistent with the parens patriae power, namely, they must be helped and not punished . . ." (p. 326).

When a newspaper publishes a child's name, regardless of the offense the notoriety which results therefrom would scar rather than scare, and, further, handicaps his prospects for future adjustment in society and acceptance by the public.

The West Virginia Supreme Court cited the case of *Landmark Communications, Inc.* v. *Commonwealth of Virginia,* —— U.S. ——, 56 L. Ed. 2d 1 (1978) for the proposition that the Virginia statute jeopardized free discussion and constituted an improper prior restraint. Petitioners contend that a close reading of *Landmark* reveals that the case was not decided on the issue of whether the statute created an impermissible prior restraint. In fact, this Court stated that that was not the issue, and more specifically, that the statute did not constitute a prior restraint.

Finally, and perhaps most importantly, Code 49-7-3 provides that a newspaper may publish a child's name upon obtaining an order from the Court. Therefore, petitioners assert that the statute does not impose an

absolute prohibition. The judge is the proper person to determine whether a child's name should be published, because he possesses the necessary legal expertise, and, as judge he has the duty to uphold the State's policy of protecting the juvenile for later rehabilitation.

Respondent submits that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight and the interest the statute seeks to protect is substantial. The press is usually more interested in events than in names and under West Virginia law no prohibition is placed upon the press as to the reporting of events, such as the shooting here.

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, and issue a mandate accordingly.

Respectfully submitted,

CHAUNCEY H. BROWNING
Attorney General of West Virginia

CLETUS B. HANLEY
Special Assistant Attorney General

BETTY L. CAPLAN
Special Assistant Attorney General

State Capitol, Room E-26
Charleston, West Virginia 25305

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, CLETUS B. HANLEY, one of Counsel for the Petitioners, and a member of the Bar of The Supreme Court of The United States, hereby certfiy that, on the 28th day of December, 1978, I served three copies of the foregoing Brief of Petitioners on each of the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Rudolph L. DiTrapano, Attorney at Law, DiTrapano, Mitchell, Lawson and Field, 604 Virginia Street, East, Charleston, West Virginia 25301 and F. Paul Chambers, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322. I further certify that all parties required to be served have been served.

/s/ CLETUS B. HANLEY
Cletus B. Hanley
SPECIAL ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305

Counsel for Petitioners

Supreme Court, U. S.
FILED
JAN 29 1979
DAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,

Respondents.

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENTS

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322

RUDOLPH L. DI TRAPANO
DI TRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia 25301

Attorneys for Respondents

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory and Constitutional Provisions Involved 2

Statement of the Case 4

Summary of Argument 8

ARGUMENT

Introduction: Issues Not Raised by the Case 10

I. The Proscription in West Virginia Code 49-7-3 Against Publication by Newspapers of the Name of Any Juvenile Against Whom Charges Have Been Filed "Without a Written Order of the Court" Is an Unconstitutional Prior Restraint in Violation of the First Amendment 11

A. The Nature of the Prior Restraint 11

B. The "Narrow Exceptions" to the Prohibition on Prior Restraints 12

C. The Confidentiality of the Names of Alleged Juvenile Offenders 16

1. The Information Sought to Be Suppressed Is Truthful 20

2. The Information Sought to Be Suppressed Is Already Public 22

PAGE

3. The Prior Restraint Cannot Serve Its Intended Purpose 24

4. Alternative Means Are Available to Accomplish the Purposes of the Statute 27

II. West Virginia Code 49-7-3 Violates the Equal Protection Clause of the Fourteenth Amendment in Prohibiting Only Newspapers From Identifying Juvenile Offenders 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases:

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 13n
Bates v. *State Bar*, 433 U.S. 350 (1977) 21
Brandreth v. *Lance*, 8 Paige Ch. 24 (N.Y. 1839) 19n
Breed v. *Jones*, 421 U.S. 519 (1975) 31n

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 10, 22, 22n

Davis v. *Alaska*, 415 U.S. 308 (1974) 17, 18, 18n

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 35

Freedman v. *Maryland*, 380 U.S. 51 (1965) 13n

In re Gault, 387 U.S. 1 (1967) 24, 25, 31n

Grosjean v. *American Press Co.*, 497 U.S. 233 (1936) 15

Houchins v. *KQED, Inc.*, 98 S. Ct. 2588 (1978) 19, 20

PAGE

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436 (1957) 13n
Kunz v. *New York*, 340 U.S. 290 (1951) 15

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 9, 10, 12, 19
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977) 21

McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 25
Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 (1976) 35
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 20, 20n

Near v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) 8, 12, 14, 15, 17, 19n
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) ..*passim*
New York Times Co. v. *Starkey*, 51 App.Div.2d 60, 380 N.Y.S.2d 239 (2d Dep't 1976) 14n
New York Times Co. v. *United States*, 403 U.S. 713 (1971) 12, 13, 15

Oklahoma Publishing Co. v. *District Court*, 430 U.S. 308 (1977) 22
Olmstead v. *United States*, 277 U.S. 438 (1928) 24n
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 7

Patterson v. *Colorado ex rel. Attorney General*, 205 U.S. 454 (1907) 15
Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973) 11n

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 35

PAGE

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 13, 13n
State v. *Allen*, 73 N.J. 132, 373 A.2d 377 (1977) 14n
State ex rel. County Court v. *State Road Comm'n*, 147 W. Va. 623, 129 S.E.2d 726 (1963) 4n
State ex rel. Daily Mail Publishing Co. v. *Smith*, —— W. Va. ——, 248 S.E.2d 269 (1978) 1, 7, 8

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 21
Times-Picayune Publishing Corp. v. *Marullo*, 334 So.2d 426 (La. 1976) 14n

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 21

Williams v. *Rhodes*, 393 U.S. 23 (1968) 35

Court Rules:

Alaska Children's Rules
R. 12(d)(2) 29n
R. 26 ..... 29n

Ariz. Juv. Ct. Rule 19 ..... 29n

Cal. Ct. Rule 1311 ..... 29n

Colo. Juv. Proc. Rule 19(b) 29n

Conn. Ct. Rule 1134 ..... 30n

Del. Fam. Ct. Rules
R. 200 ..... 30n
R. 350 ..... 30n
R. 370 ..... 30n

PAGE

D.C. Juv. Ct. Rules
R. 53 ..... 30n
R. 55 ..... 30n

Idaho Dist. Ct. Rules
R. 21(b) 30n
R. 22(b) 30n

Minn. Juv. Ct. Rules
R. 11-2 ..... 30n
R. 11-3 ..... 30n

Mo. Juv. Ct. Rules
R. 117.02 ..... 30n
R. 122.02 ..... 30n
R. 122.03 ..... 30n

N.J. Ct. Rules
R. 1:38 ..... 30n
R. 5:9-1(a) 30n
R. 5:10-6(b) 30n
R. 5:10-7 ..... 30n

Ohio Juv. Proc. Rule 37(B) 30n, 32n

Law Reviews:

Conway, *Publicizing the Juvenile Court: A Public Responsibility*, 16 Juv. Ct. Judges J. 21 (1965) 32n

Edwards & Sagatun, *A Study of Juvenile Record Sealing Practices in California*, 4 Pepperdine L. Rev. 543 (1977) 25n

Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955) 15

PAGE

Foster, Dintz & Reckless, *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 Soc. Problems 202 (1972) 16n

Goodale, *The Press Ungagged—The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497 (1977) 14n

Riederer, *Secrecy or Privacy? Communication Problems in the Juvenile Court Field*, 17 J. Mo. Bar Ass'n 66 (1961) 33n

Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 Crime & Delinq. 180 (1971) 17n

Spalty, *Juvenile Court Record Keeping*, 4 Colum. Hum. Rights L. Rev. 461 (1972) 25n

Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975) 20

Reports and Statistical Studies:

ABA, *Standards for the Administration of Criminal Justice, Fair Trial and Free Press* (approved Aug. 9, 1978) 15n

Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics—1977* (1978) 21n

IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Juvenile Records and Information Systems* (Tent. Draft 1977) 33, 33n

National Advisory Committee on Criminal Justice, Standards & Goals, *Report of the Task Force on Juvenile Justice & Delinquency Prevention* (1976).... 28n, 29, 34n

Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) 17n

PAGE

S. Rep. No. 93-1011, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5283 ..... 31n

U.S. Dep't of Commerce, *U.S. Census—1970* 26n

U.S. Dep't of Health, Education & Welfare, *Legislative Guide for Drafting Family & Juvenile Court Acts* (1969) 34n

U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States 1977* (1978) 22n

Statutes—Federal:

Criminal Code, 18 U.S.C. §5038(d)(2) (1976) 31n

Judicial Code, 28 U.S.C. §1257(3) (1976) 2

Statutes—State:

Ala. Code tit. 12
§12-15-65(a) (1977) 29n
§12-15-100 *et seq.* (1977) 29n
§12-15-100(d) (1977) 32n
§12-15-101(c) (1977) 32n

Alaska Stat.
§09.25.120(2) (1973) 29n
§47.10.070 (1975) 29n
§47.100.090 (1975 & Supp. 1977) 29n

Ark. Stat. Ann.
§45-434 (1977) 29n
§45-442 (1977) 29n
§45-443 (1977) 29n, 32n

PAGE

Cal. Welf. & Inst. Code
§676 (West 1972) 29n
§827 (West Supp. 1978) 29n

Colo. Rev. Stat.
§19-1-107 (1974) 29n
§19-1-107(6) (1974) 32n
§19-1-111 (1974) 29n

Conn. Gen. Stat. Ann.
§1-19(b) (3) (D) (West Supp. 1978) 29n
§51-305 (as amended by Conn. P.A. 78-280, P.A. 78-318) 29n
§51-319 (as amended by Conn. P.A. 78-379) 30n
§51-335 (as amended by Conn. P.A. 78-280) 29n
§54-76*l* (West Supp. 1978) 29n

Conn. P.A. 78-280
§92 ..... 29n
§95 ..... 29n

Conn. P.A. 78-318, §27 ..... 29n

Conn. P.A. 78-379, §11 ..... 30n

Del. Code Ann. tit. 10, §972 (1975) 30n

D.C. Code
§16-2316(e) (Supp. V 1978) 30n
§§16-2331 *et seq.* (Supp. V 1978) 30n
§16-2336 (Supp. V 1978) 32n

Fla. Stat.
§39.031 (West Supp. 1978) 30n
§39.09(1)(c) (West Supp. 1978) 30n

PAGE

§39.09(4) (West Supp. 1978) 30n
§39.12 (West Supp. 1978) 30n

Ga. Code Ann.
§24A-1801(c) (1976) 30n
§§24A-3501 *et seq.* (1976 & Supp. 1978) 30n
§24A-3503(g)(1) (1976) 32n

Haw. Rev. Stat.
§571-41 (Supp. 1975) 30n
§571-84 (Supp. 1975) 30n

Idaho Code
§16-1811(7) (Supp. 1978) 30n
§16-1813 (Supp. 1978) 30n
§16-1816 (Supp. 1978) 30n

Ill. Ann. Stat. ch. 37
§701-20(6) (Smith-Hurd Supp. 1978) 30n
§702-8(3) (Smith-Hurd 1972) 30n
§702-10 (Smith-Hurd Supp. 1978) 30n
§702-10.1 (Smith-Hurd Supp. 1978) 30n

Ind. Code Ann.
§31-5-2-2 (Burns 1973) 30n
§31-5-7-15 (Burns Supp. 1978) 30n
§31-6-7-10 (Burns Supp. 1978) 30n
§31-6-8-1 (Burns Supp. 1978) 30n

Iowa Code Ann.
§232.27 (West Supp. 1978) 30n
§§232.54 *et seq.* (West 1969) 30n

1978 Iowa H.F. 248
§19 ..... 30n
§§77 *et seq.* 30n

PAGE

Kan. Stat.
§38-805 (as amended by 1978 Kan. Sess. Laws ch. 158) 30n
§38-822 (Supp. 1977) 30n
§45-201 (Supp. 1977) 30n

1978 Kan. Sess. Laws ch. 158
§2 ..... 30n
§3 ..... 30n

Ky. Rev. Stat.
§208.060(1) (1977) 30n
§208.340 (1977) 30n

La. Rev. Stat. Ann.
§13:1586 (West 1968) 30n
§13:1586.1 (West Supp. 1978) 30n

1978 La. Act 172, art. 69 ..... 30n

Me. Rev. Stat. tit. 15
§3307 (Supp. 1978) 30n
§3308 (Supp. 1978) 30n

Md. Cts. & Jud. Proc. Code Ann.
§3-812(e) (Supp. 1978) 30n
§3-828 (Supp. 1978) 30n

Mass. Gen. Laws Ann. ch. 119
§60A (West Supp. 1978) 30n
§65 (West 1969) 30n

Mich. Comp. Laws Ann.
§712A.17 (West 1968) 30n
§712A.28 (West 1968) 30n

PAGE

Minn. Stat. Ann.
§260.155(1) (West 1971) 30n
§260.161 (West 1971) 30n

Miss. Code Ann.
§43-21-17 (as amended by 1975 Miss. Laws ch. 494) 30n
§43-21-19 (1972) 30n
§43-23-17 (1972) 30n
§43-23-41 (as amended by 1977 Miss. Laws ch. 474) 30n

1977 Miss. Laws ch. 474, §7 ..... 30n

1975 Miss. Laws ch. 494, §3 ..... 30n

Mo. Ann. Stat.
§211.171(5) (Vernon 1962) 30n
§211.321 (Vernon Supp. 1979) 30n

Mont. Rev. Codes Ann.
§10-1220(5) (Supp. 1977) 30n
§10-1230 (Supp. 1977) 30n
§10-1231 (Supp. 1977) 30n
§10-1241 (Supp. 1977) 30n

Neb. Rev. Stat.
§43-206.04(2) (1974) 30n
§43-243 (Supp. 1978) 30n

Nev. Rev. Stat.
§62.193(1) (1977) 30n
§62.200 (1977) 30n
§62.270 (1977) 30n

PAGE

N. H. Rev. Stat. Ann.
§169:14 (as amended by 1978 N.H. Laws ch. 37).... 30n
§169:20 (1978) 30n
§169:22 (1978) 30n
§169:27 (1978) 30n, 32n
§169:28 (1978) 30n, 32n

1978 N.H. Laws ch. 37 ..... 30n

N. J. Stat. Ann.
§2A:4-65 (West Supp. 1978) 30n
§2A:4-65(d) (West Supp. 1978) 32n

N. M. Stat. Ann.
§13-14-28 (Supp. 1977) 30n
§13-14-42 (as amended by 1977 N. M. Laws ch. 278) 30n
§13-14-42(D) (as amended by 1977 N. M. Laws ch. 278) 32n

1977 N. M. Laws ch. 278, §11 .....30n, 32n

N. Y. Crim. Proc. Law
§720.15 (McKinney 1971 & Supp. 1978) 30n
§720.35 (McKinney 1971 & Supp. 1978) 30n
§725.15 (McKinney Supp. 1978) 30n
§725.20 (McKinney Supp. 1978) 30n

N. Y. Fam. Ct. Act
§741(b) (McKinney 1975) 30n
§750(1) (McKinney Supp. 1978) 30n
§784 (McKinney 1975) 30n

PAGE

N. C. Gen. Stat.
§7A-285 (Supp. 1977) 30n
§7A-287 (1969) 30n

N. D. Cent. Code
§27-20-24 (Supp. 1977) 30n
§§27-20-51 *et seq.* (1974 & Supp. 1977) 30n

Ohio Rev. Code Ann.
§2151.14 (Page 1976) 30n
§2151.35 (Page 1976) 30n

Okla. Stat. Ann. tit. 10
§1111 (West Supp. 1978) 30n
§1125 (West Supp. 1978) 30n
§1127(a) (West Supp. 1978) 30n
§1506(b) (West Supp. 1978) 30n

Or. Rev. Stat.
§419.498(1) (1977) 30n
§419.567 (1977) 30n
§419.584 (1977) 30n

Pa. Cons. Stat. Ann. tit. 42
§6307 (Purdon 1978 Pamphlet, pt. 1) 30n
§6308 (Purdon 1978 Pamphlet, pt. 1) 31n
§6336(d) (Purdon 1978 Pamphlet, pt. 1) 31n

R. I. Gen. Laws
§8-10-21 (1970) 31n
§14-1-30 (1970) 31n
§14-1-64 (Supp. 1977) 31n

PAGE

S. C. Code
§14-21-30 (1977) 31n, 32n
§14-21-590(d) (1977) 31n
§14-21-610 (1977) 31n
§14-21-810(a)(14) (1977) 31n

S. D. Codified Laws
§26-8-32 (1976) 31n
§26-8-33 (1976) 31n
§26-8-34 (1976) 31n, 32n

Tenn. Code Ann.
§37-224(d) (1977) 31n
§§37-251 *et seq.* (1977) 31n

Tex. Fam. Code Ann. tit. 3
§51.14 (Vernon 1975) 31n
§54.08 (Vernon 1975) 31n

Utah Code Ann.
§78-3a-33 (1977) 31n
§78-3a-55 (1977) 31n

Vt. Stat. Ann. tit. 33
§651 (Supp. 1978) 31n
§663 (Supp. 1978) 31n

Va. Code
§§16.1-300 *et seq.* (Supp. 1978) 31n
§16.1-309 (Supp. 1978) 32n

Wash. Rev. Code Ann.
§13.04.270 (Supp. 1978) 31n
§13.04.272 (Supp. 1978) 31n
§13.34.110 (Supp. 1978) 31n

PAGE

W. Va. Code
§49-5-10 (Supp. 1978) 6n
§49-7-1 (Supp. 1978) 31n
§49-7-3 (1976) ..... *passim*
§49-7-20 (1976) 3
§49-15-7(e) (1976 & Supp. 1978) 28

1977 W. Va. Laws ch. 65 ..... 6n

1975 W. Va. Laws ch. 126 ..... 6n

Wis. Stat.
§48.31 (added by 1977 Wis. Laws ch. 354) 31n
§48.396 (added by 1977 Wis. Laws ch. 354) 31n

1977 Wis. Laws ch. 354
§47 ..... 31n
§53 ..... 31n

Wyo. Stat.
§14-115.25 (Supp. 1975) 31n
§14-115.40 (Supp. 1975) 31n
§14-115.41 (as amended by 1976 Wyo. Laws ch. 3) 31n

1976 Wyo. Laws ch. 3, §1 ..... 31n

Treatises:

C. Bartollas, S. Miller & S. Dinitz, *Juvenile Victimization* (1976) 17n

A. M. Bickel, *The Morality of Consent* (1975) 11, 20

R. Hardy & J. Cull, *Psychological and Vocational Rehabilitation of the Youthful Delinquent* (1974) 29n

PAGE

D. Matza, *Becoming Deviant* (1969) 17n

E. Schur, *Labeling Deviant Behavior* (1971) 17n

The Labelling of Deviance: Evaluating a Perspective (W. Gove ed. 1975) 16n

Other Authorities:

4 Blackstone Comm. 12

G. Orwell, *1984* (Signet ed.) 23n

National Council on Crime and Delinquency, Standard Family Court Act (1959) 31n

Restatement (Second) of Torts §652D (Tent. Draft No. 13, 1967) 22n

Restatement (Second) of Torts §652D (1977) 22n

Uniform Juvenile Court Act (1968) 34n

U.S. Constitution

Amendment I ..... *passim*

Amendment VI 8, 14, 14n, 15, 17

Amendment XIV 2, 3, 34, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,

Respondents.

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the West Virginia Supreme Court of Appeals dated June 27, 1978 is set forth at page 1a in the Brief for Respondents Daily Mail Publishing Co., et al., in Opposition to the Issuance of a Writ of Certiorari. It is reported at —— W.Va. ——, 248 S.E.2d 269 (1978).

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

Questions Presented

1. Is West Virginia Code 49-7-3 violative of the First and Fourteenth Amendments to the United States Constitution as a prior restraint on freedom of the press?

2. Is West Virginia Code 49-7-3 violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution by making criminal the truthful publication of information by newspapers, while permitting the identical information to be published by magazines and other periodicals, broadcast on radio and television and otherwise generally and publicly disseminated?

Statutory and Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution, so far as relevant, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

West Virginia Code 49-7-3 provides:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

West Virginia Code 49-7-20 provides:

> "A person who violates an order, rule or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

Statement of the Case

On the morning of February 9, 1978, a 15 year-old student, Arthur Smith, was shot and killed by three shots fired by a 14 year-old classmate at Hayes Junior High School in St. Albans, West Virginia. Seven eye-witnesses saw the shooting. The alleged assailant, Stuart Perrock, fled from the school and was apprehended approximately three hours after the shooting following a search involving Sheriff's Deputies, State Police and the use of a State Police helicopter. When arrested, Perrock had in his possession a .22 caliber pistol and a knife. Perrock was returned to the school in the police helicopter, from which he emerged handcuffed and surrounded by police officers. (D.M. Pet. ¶ 5(e), A.6, 13, 20-23; Demurrer, A.33)*

After the shooting occurred, but before Perrock's capture, both the Charleston Daily Mail (an afternoon newspaper) and The Charleston Daily Gazette (a morning newspaper) dispatched journalists to the school in which the shooting had occurred. The Daily Mail sent two reporters and a photographer to the scene; upon arrival, they learned that there were several eye-witnesses to the death; that Perrock was the alleged assailant; and that Perrock's identity was apparently known throughout the school. (D.M. Pet. ¶ 5(a)(b), A.4; Demurrer, A.33). (The identity of Perrock as the alleged assailant was confirmed to the Daily Mail later that afternoon by police officials and an assistant prosecuting attorney of Kanawha County, West Virginia.) (D.M. Pet. ¶ 5(e), A.6, 20-23; Demurrer, A.33). The experience of The Charleston Gazette was similar, their reporter also having been advised of Perrock's name by one of the policemen at the school. (C.G. Pet. ¶ 7, A.25; Answer A.30).

The initial response of the Daily Mail and of The Charleston Gazette differed as to the use each would make of the information learned by both newspapers as to Perrock's name. The editorial decision was made at the Daily Mail not to use Perrock's name in its February 9, 1978 afternoon edition in light of the statutory prohibition against publication without a prior court order (D.M. Pet. ¶ 5(b), A.4; Demurrer, A.33); the contrary editorial decision was reached at The Charleston Gazette which published Perrock's name and picture in an article in its February 10, 1978 morning edition relating to the killing in the school and Perrock's subsequent escape and capture. (A.15-19).

By early morning on February 10, 1978, Perrock's name had not only been published by The Charleston Gazette, but broadcast by, among others, Charleston radio station WCHS (on February 9) and by Charleston radio stations WCAW and WVAF (on February 10). (D.M. Pet. ¶ 5(c) A.5; Demurrer, A.33). The Daily Mail thereupon deter-

* The facts set forth in this paragraph, and all other facts set forth herein, were affirmatively pleaded by Respondents in their petitions filed with the West Virginia Supreme Court of Appeals and were either demurred to or admitted (by not being denied) by Petitioners. Under West Virginia law, a demurrer constitutes an admission of all facts well pleaded. *State ex rel. County Court* v. *State Road Comm'n*, 147 W.Va. 623, 129 S.E.2d 726 (1963). A demurrer (A.33) was filed in response to the petition of the Daily Mail (A.2), thus admitting all the well-pleaded facts contained therein, including the truth of the news article published on February 10, 1978 (A.20-23) which the petition affirmatively alleged was true (D.M. Pet. ¶ 5(e), A.6). An answer (A.30) was filed in response to the petition of The Charleston Gazette (A.24); to the extent the answer puts at issue any allegation in the petition, no reference to such disputed issues are made in this factual statement.

Page references in this section of the brief to the Appendix ("A. .....") filed with this Court refer both to the appropriate pages of the petitions and of the demurrer and answer; the petition of the Daily Mail and its employees is referred to as "D.M. Pet. ¶ ....."; that of The Charleston Gazette and its employees is referred to as "C.G. Pet. ¶ ....."

mined that since Perrock's identity was public knowledge, it too should refer to Perrock by name in its articles with respect to the crimes in the February 10, 1978 issue of the Daily Mail, and did so. (A.20-23). Neither The Charleston Gazette nor the Daily Mail obtained a court order, as required by West Virginia Code 49-7-3, prior to publishing Perrock's name.*

Indictments were returned on March 1, 1978 against both newspapers and various of their employees. The Daily Gazette Company, owner and publisher of The Charleston Gazette, was indicted, as were W.E. Chilton, III, its publisher; Don Marsh, its editor;** and Leslie H. Milam, the journalist who wrote the article referring to Perrock published on February 10, 1978 by the Charleston Gazette. (A.28). The Daily Mail Publishing Company, publisher of the Daily Mail, was indicted; as were Jack Maurice, its editor, and Mary Schnack, the journalist whose article which referred to Perrock was published on February 10, 1978 by

* West Va. Code 49-7-3 applies only when the juvenile court has jurisdiction over the juvenile, and at the time of the killing Perrock could not have been tried as an adult. *See* 1977 W. Va. Laws ch. 65. Seven months earlier, however, the statute would not have applied to this case because 1975 W. Va. Laws ch. 126 required that all juveniles charged with capital offenses be tried in criminal court. One month after the slaying of Arthur Smith, the West Virginia Legislature reenacted and amended W. Va. Code 49-5-10 (Supp. 1978) to provide that under certain circumstances a juvenile may be tried as an adult.

** Petitioners' brief, while omitting virtually all the facts set forth above, prints the entirety of an editorial of Don Marsh explaining the personal—and troubled—nature of the decision of The Charleston Gazette to publish Perrock's name. (Br. pp. 4-5). Petitioners do not, however, suggest the relevance of the editorial to the legal issues raised in this case; to the extent the editorial is relevant at all, it is only because it suggests the difficult nature of the decision of The Charleston Gazette to test, if necessary, the constitutionality of West Virginia Code 49-7-3—and the need for definitive judicial resolution of the constitutional issues raised by this case.

the Daily Mail. Both indictments charged that the defendants "did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years . . . while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock . . . in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County. . . ."

Both newspapers invoked the original jurisdiction of the West Virginia Supreme Court of Appeals. The Daily Mail sought a Writ of Prohibition against the Judges of the Circuit Court of Kanawha County and the Prosecuting Attorney of that County to prevent further proceedings under the Grand Jury Indictment; The Charleston Gazette sought similar relief from prosecutions. On March 13, 1978, a rule was issued in Prohibition making both cases returnable on May 16, 1978. The two petitions were consolidated because, in the view of the West Virginia Supreme Court of Appeals, "both represent a conceptually indistinguishable permutation of a classic First Amendment . . . issue. . . ." (2a).*

On June 27, 1978, the West Virginia Supreme Court of Appeals held W.Va.Code 49-7-3 unconstitutional as an impermissible prior restraint on freedom of the press. Citing this Court's rulings in cases such as *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) and *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the decision emphasized the "heavy presumption" against the constitutional validity of any prior restraint on expression (4a).

* References to "....a" are to the appropriate pages of the opinion of the West Virginia Supreme Court of Appeals, reprinted as an appendix to the brief of the Daily Mail in opposition to the issuance of a writ of *certiorari*.

Rejecting the argument that "a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice" were "sufficiently compelling to permit the statute under review to withstand constitutional scrutiny" (7a), the court held the statute unconstitutional under the First Amendment.

Summary of Argument

At issue in this case is the constitutionality of a West Virginia statute which makes criminal the publication by newspapers of the name of any alleged juvenile offender in the absence of a written order of the court permitting such publication. The West Virginia Supreme Court of Appeals has held the statute to be an unconstitutional prior restraint on freedom of the press.

This brief first demonstrates that the statute, by requiring advance governmental approval before publication, is a prior restraint in the classic mold of licensing laws. Such statutes have long been described by the Court as presumptively unconstitutional. Indeed, prior restraints on publication of what would otherwise be constitutionally protected material has been approved—and only theoretically approved—in but two areas: an extremely narrow one relating to national security referred to in *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); and a similarly narrow one relating to the Sixth Amendment rights of a defendant considered in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

No other exception to the prohibition of prior restraints on such publication has received the *imprimatur* of this Court, and this case, we urge, is hardly one in which still further exceptions should be countenanced. Not only is the

interest sought to be vindicated by confidentiality of the names of juvenile offenders insufficient to overcome the ban on prior restraints (or, in fact, on subsequent punishments), but four independent factors make this a uniquely ill-suited case for any favorable consideration of such a change in law.

The first is that the information sought to be suppressed is truthful; numerous recent opinions of this Court, including but not limited to recent "commercial speech" rulings, are cited demonstrating the special protection afforded just such expression.

Second, given the fact that the information sought to be suppressed is already publicly known, we urge that no efforts can constitutionally be undertaken to limit further dissemination of the information or to punish those who publish it. Numerous recent cases of this Court are relied upon, including the Court's ruling in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978).

Third, we demonstrate that for a variety of reasons the statute cannot serve its intended purpose. The information sought to be suppressed is, through other methods, widely and routinely disseminated; the coverage of the statute is itself so underinclusive as to assure lack of success in achieving the statutory aim; and (as this case well illustrates) rumors—and personal knowledge—of juvenile offenses, are, in any event, widespread in the communities in which the juvenile offenders reside.

Fourth, we show that alternative means are available to accomplish the statutory purposes. Other statutes (such as West Virginia's legislation barring discrimination against persons with juvenile records) may assist in this effort. Moreover, West Virginia is in a distinct minority of states which seeks to impose criminal penalties on news-

papers for publication of material such is at issue here—a factor given significant weight by this Court in *Landmark.*

Finally, we urge that as a simple matter of equal protection law, the West Virginia statute cannot begin to pass constitutional scrutiny. Far from it being necessary to limit the scope of the statutory ban to newspapers, and only newspapers, the self-imposed limits of the statute assure its lack of success.

ARGUMENT

Introduction: Issues Not Raised by the Case

It is well to begin this brief with a short description of what this case does not involve. First, this is not an "access" case; no claim is asserted that the juvenile court system was itself constitutionally obliged to have furnished to the newspapers the information independently learned by them.

Second, the case does not involve any leaks from the juvenile courts themselves: all the information printed was obtained from public sources, each of which was fully disclosed in the articles.

Third, the case does not present any claim of invasion of privacy, whether premised on "false light," commercial appropriation, or—as in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 489 (1975)—"unwanted publicity about [one's] private affairs." Whatever else may be said of this case, the shooting which took place in Hayes Junior High School was not a "private affair."

This is a prior restraint case. So clear is the constitutional antipathy to such restraints, which "fall on speech

with a brutality and a finality all their own," * that each member of this Court has accepted the "condemnation of prior restraint as presumptively unconstitutional." ** All else aside, that presumption alone, unrebutted as it is here, provides ample grounds for affirming the decision below.

I.

The Proscription in West Virginia Code 49-7-3 Against Publication by Newspapers of the Name of Any Juvenile Against Whom Charges Have Been Filed "Without a Written Order of the Court" Is an Unconstitutional Prior Restraint in Violation of the First Amendment

A. *The Nature of the Prior Restraint*

The articulation by petitioners of the "sole issue" supposedly presented by this case (Br. p. 3) appears to raise as a threshold question not whether the prior restraint imposed by West Virginia Code 49-7-3 is constitutional, but whether it is a prior restraint at all.*** Whatever difficulties this case may be thought to pose, that can hardly be one of them.

The statute in question is, to be sure, not a prior restraint because it subjects newspapers to criminal punishments for what they print; if that were the only vice of the statute, relevant First Amendment analysis could proceed, as in

---

* A.M. Bickel, *The Morality of Consent* 61 (1975).

** *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 558 (1976) quoting from *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Rights,* 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting).

*** "The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment. . . ." (Br. p. 3).

Landmark, as to whether any such statute punishing free expression could possibly pass constitutional muster.

But the West Virginia statute at issue here goes further: it precludes publication of the name of the juvenile, however the name was learned, in the absence of *"a written order of the court"* permitting such publication. Any proscription against publication without advance approval by a governmental official is a prior restraint—one, in fact, in a far more traditional mold than has been considered by this Court in cases ranging in time from *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) through *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) and *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976). All those cases involve prior restraints imposed by judicial injunctions, a form of restriction which *Near* treated as a prior restraint because of its "operation and effect," 283 U.S. at 708, rather than its conceptual similarity to 17th century English licensing.

The ban on publication without prior governmental approval is at the heart of licensing—and of censorship. *See* 4 Blackstone Comm. 151, 152; *Near*, 283 U.S. at 713-14. In fact, the only conceptual difference between the statutory scheme effected by the West Virginia statute and the historic form of pre-publication licensing is the identity of the governmental official imposing the restraint. As to that, as many cases including *New York Times* and *Nebraska Press Ass'n* themselves demonstrate, there is no more First Amendment tolerance for the imposition of prior restraints by the judiciary than by any other branch of government.

B. *The "Narrow Exceptions" to the Prohibition on Prior Restraints*

The mere categorization of a state statute as embodying a prior restraint does not, of course, in and of itself conclusively demonstrate its unconstitutionality. There is no doubt that there are circumstances in which prior restraints may be constitutional. But the fact that all prior restraints are "not unconstitutional *per se*," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975), does not mean that there is to be a continuing and wholly *ad hoc* balancing process as to whether particular prior restraints are or are not to be entered. As this Court made clear in *Southeastern Promotion*, "[i]n order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559)*

Until this Court's ruling in *Nebraska Press Ass'n*, the "narrowly defined exceptions" on publication of constitutionally protected material had been limited to *one* area—that of national security. As summarized by Mr. Justice Brennan in his concurring opinion in *New York Times Co.*:

> "Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), during which time '[n]o one would question but that a government might prevent actual obstruction to its recruiting

* *As Southeastern Promotion* itself emphasizes, even when prior restraints are otherwise appropriate, the most rigorous procedural safeguards "designed to obviate the dangers of a censorship system" are required. 420 U.S. at 559, quoting from *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). Among them are clear statutory guidelines, the placing of the burden of proof on the party seeking the restraint and assurance of prompt judicial determination. *E.g.*, *Nebraska Press Ass'n, supra*, 427 U.S. at 539 (Brennan, J., concurring in judgment); *Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70-71 (1963); *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). None of those safeguards are provided in the statute at issue.

> service or the publication of the sailing dates of transports or the number and location of troops.' *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931)." (403 U.S. at 726).

In *Nebraska Press Ass'n,* an additional and extremely narrow category in which, in theory, prior restraints on publication could conceivably be imposed was discussed—*e.g.,* circumstances in which a defendant's Sixth Amendment rights would otherwise be lost. But the majority opinion in *Nebraska Press Ass'n* refused to "assign priorities as between First Amendment and Sixth Amendment rights" (427 U.S. at 561) and emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" (*id.* at 559). The majority opinion, as well as each concurring opinion, stressed the rarity with which prior restraints, even for the purpose of protecting another constitutional right, could conceivably be entered: the Court's reversal, it was emphasized, was "not simply a result of assessing the adequacy of the showing made in this case" but was "illustrative" of the difficulties parties would have in the future of meeting the "heavy burden" of demonstrating the propriety of prior restraints. (*Id.* at 569)*

---

* Since the *Nebraska Press Ass'n* decision, the practice of issuing restrictive orders for the purpose of protecting Sixth Amendment rights appears to have all but totally ended. A few further restrictive orders were entered shortly before or after the ruling in *Nebraska Press Ass'n* and reversed. *See e.g., Times-Picayune Publishing Corp.* v. *Marullo,* 334 So.2d 426 (La. 1976); *State* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977); *New York Times Co.* v. *Starkey,* 51 App.Div.2d 60, 380 N.Y.S.2d 239 (2d Dep't 1976). We are aware of no appellate rulings subsequent to *Nebraska Press Ass'n* in which any such prior restraint has been affirmed. *See generally* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association* v. *Stuart,* 29 Stan.L.Rev. 497, 498 (1977).

Moreover, since—and, in good part, as a result of—this Court's ruling in *Nebraska Press Ass'n,* the American Bar Association has opposed the issuance of prior restraints on publication relating to all criminal cases. As set forth in Standard 8-3.1 of the Standards Relating to the Administration of Criminal Justice, Fair Trial & Free Press (approved August 9, 1978):

> "No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."

The virtually absolute prohibition on prior restraints on publication except—and thus far only hypothetically—in these one or two areas is deeply rooted in American history. The First Amendment itself "developed directly out of attempts to license the press" and as Professor Emerson has written, "[n]othing in the growth of modern society has, thus far at least, appealed to the country as grounds for altering the considerations which led to the elimination of prior restraint upon the press." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 662 (1955).

In a number of opinions prior and subsequent to *Near,* the ban on prior restraints on publication was expressed as an absolute. *See, e.g., Patterson* v. *Colorado ex rel. Attorney General,* 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936); *Kunz* v. *New York,* 340 U.S. 290, 307 (1951) (Jackson, J., dissenting). *In dictum* in *Near,* a narrow exception in certain national security cases was adverted to; in *New York Times Co.,* the exception was discussed; and in *Nebraska Press Ass'n,* the possibility of prior restraints to assure a defendant's Sixth Amendment rights was considered. In *no* case involving publication of what would otherwise be protected expression under the First Amendment—let alone a case involving what this Court referred to in *Nebraska Press Ass'n* as "news and commentary on current events," 427 U.S. at 559—has any other possible exception received, in any fashion, the *imprimatur* of this Court.

C. *The Confidentiality of the Names of Alleged Juvenile Offenders*

This is hardly a case which warrants any change in pre-existing law. Petitioners themselves have barely even attempted to defend, let alone to set forth the purposes of, the West Virginia statute.* Apart from the observation that the notoriety which results from publication of the juvenile offender's name would "scar rather than scare," the only justification offered by petitioners is that publication "handicaps [the offender's] prospects for future adjustment in society and acceptance by the public." (Br. p. 6). The *amici curiae* supporting reversal argue, as well, that publication of the name of the juvenile offender constitutes a "traumatic stigma, counter productive to any effort at rehabilitation in the majority of instances." (Br. p. 4).

As the facts of this case well illustrate, these appear, at best, to be dubious generalizations; surely Perrock's psyche is more scarred from killing his classmate, fleeing, being captured and the like than by the fact that his name appeared in the newspapers for a day or two. Indeed, there is absolutely no evidence in this record—or, so far as we can tell, in the literature—to the effect that any juvenile has ever committed a crime because his name was referred to in a newspaper.**

---

* No legislative history of the statute of any sort appears to exist and none has, in any event, been offered by petitioners.

** There is, to be sure, scholarly debate as to the effect of "labelling" a juvenile as a criminal. *See, e.g.*, the analyses contained in *The Labelling of Deviance: Evaluating a Perspective* (W. Gove ed. 1975) and Foster, Dinitz & Reckless, *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 Social Problems 202 (1972). However, experts on labelling theory do not focus on newspaper reports as possible examples of labelling, but on the attitudes of those with whom the juvenile must deal. It is the process of the delinquency adjudication itself, the

In any event, and whatever the merits of the West Virginia policy of not revealing the names of juveniles accused of offenses within the juvenile court system, the effort to provide confidentiality to alleged juvenile offenders hardly rises to a level even arguably equivalent to those rare possible exceptions adverted to in *Near* and *Nebraska Press Ass'n.*

In *Davis* v. *Alaska,* 415 U.S. 308 (1974), this Court considered the question of how to balance the right of a juvenile to confidentiality against the Sixth Amendment confrontation right of a defendant. The Court's holding and its language are significant:

> "The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.
>
> "We do not and need not challenge the State's interest as a matter of its own policy in the administration

---

denigrating effects of institutionalization, with the resultant feeling of guilt, and the perceptions of those who count to him—adult authority figures, his family and peers—to which the juvenile is said to react. *See* C. Bartollas, S. Miller, & S. Dinitz, *Juvenile Victimization* 85-87 (1976); D. Matza, *Becoming Deviant* 180-81 (1969); E. Schur, *Labeling Deviant Behavior* 86-91 (1971); Snyder, *The Impact of the Juvenile Court Hearing on the Child,* 17 Crime & Delinq. 180 (1971); Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 80 (1967).

of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U.S. 1, 25 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (415 U.S. at 319).

Two elements in *Davis* are significant. First, the holding of the Court that Sixth Amendment rights must be vindicated over countervailing claims of juvenile confidentiality is persuasive analogous precedent for a similar ruling vindicating First Amendment rights over the same challenge. If, as *Nebraska Press Ass'n* holds, no "priority" is to be afforded between First and Sixth Amendment rights, there can be little basis for vindicating Sixth Amendment rights over those of the juvenile offender and refusing to do so for First Amendment rights.*

* The decision in *Davis* did involve—and was, in part, premised upon—waiver by the state in putting the juvenile offender on the witness stand and then objecting to cross-examination based upon his criminal record. (415 U.S. at 320). From the point of view of the juvenile, however, there was no waiver at all: as a result of being subpoenaed to testify, he lost the confidential treatment afforded him by statute.

Second, the language of the Court that the juvenile might suffer "temporary embarrassment" if his juvenile record were disclosed is instructive: surely, far stronger state or personal interests are required to overcome even less vigilantly enforced First Amendment precepts than the ban on prior restraints.

What is thus arrayed in this case against the First Amendment interests at issue is one of a large number of arguable—and arguably significant—societal interests.* One need not quarrel with the contention that West Virginia may attempt to keep secret the name of its alleged juvenile offenders; as in *Landmark,* this case does not pose any question of press or public access to "secret" information. What is involved is the right of the press to decide, without prior judicial approval, what it may print. That right has been vindicated ever more clearly in recent years—in, for example, *Landmark* itself;** in *Houchins* v. *KQED,*

* There are, of course, many other interests of substance which routinely fall before the virtual prohibition on prior restraints: Libel is one example. Surely a party who can allege and prove that a libel is about to be printed about him is not irrational in asserting that society is harsh in relegating him to damages and denying him an injunction—regardless of the proof he submits. Yet, since what appears to be the first prior restraint case in American history, *Brandreth* v. *Lance,* 8 Paige Ch. 24 (N.Y. 1839), the courts have consistently held that no libel may be enjoined. Again, in *Near* itself, the harm which could have been caused by permitting the publication of the racist material there involved, 283 U.S. at 724-26 (Butler, J., dissenting), was evident; the social utility of publication was minimal. Nonetheless, the Court concluded that so clear was the prohibition on prior restraints that the publication by the press could not be enjoined.

** *Landmark* was itself not a prior restraint case, but one involving subsequent punishment for dissemination of proscribed information. As Justice Brennan has observed "[p]rior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication." *Nebraska Press Ass'n,* 427 U.S. at 598 (Brennan, J., concurring in judgment).

Inc., 98 S.Ct. 2588, 2594 (1978) ("the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal"); and in the Court's ruling in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); *id.* at 259 (White, J., concurring). *See also* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975); A. M. Bickel, *The Morality of Consent* 80 (1975). To deviate from that deeply rooted policy, particularly in the context of a statute imposing prior restraints, would be particularly unjustifiable.*

1. The Information Sought to Be Suppressed Is Truthful

The prior restraint and criminal proscriptions of the West Virginia statute are directed towards a single constitutionally dubious end—the suppression of truthful expression. There is no issue in this case that Perrock did kill his classmate in front of many witnesses; indeed, it is only because Perrock was, in fact, charged before the juve-

* In light of the clarity with which this Court has held that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content . . . ," *Tornillo*, 418 U.S. at 259 (White, J., concurring), we have not canvassed all the reasons that particular journalists might, on some occasions, determine to print the name of an alleged juvenile offender. Surely, however, if the victim were a significant public official, censorship of the name of his assailant would be difficult to defend. The same is true if the juvenile offender had repeatedly committed such crimes—but no meaningful punitive action had been taken against him. The facts of this case provide another instructive example: the newspaper articles described, *inter alia*, that Smith had himself been previously accused of arson within the school; that Perrock was to be a witness in the case; and that there had been a number of fist fights between the boys at school (A. 17, 22). Such information is not only "newsworthy," it helps to supply to all the answer to the critical question of *why* the killing occurred. And it is all but impossible to convey rationally without describing—and naming—both parties to the previous altercations.

nile court that criminal proceedings could have been commenced against the Daily Mail and The Charleston Gazette.

Yet, it is an accepted principle of our jurisprudence that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted).

So basic is the principle that truthful speech must be protected that, in a series of recent decisions, it has been applied to even the most mundane of commercial transactions. A state has thus been held to be constitutionally forbidden from complete "supress[ion] [of] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *see also Bates* v. *State Bar*, 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977).

Yet that is precisely what West Virginia's statute is all about: fearful of the effects of the "truthful information" at issue here, West Virginia has attempted, however ineffectually, to suppress it. In a nation in which violent juvenile crime has increased at dizzying rates,* the proposi-

* Between 1960 and 1975, arrests of persons 18 and under increased by the following percentages in the following categories: murder and nonnegligent manslaughter (+211.1%); manslaughter by negligence (+50%); forcible rape (+102%); robbery (+375%); aggravated assault (+240.6%); burglary (+137.5%); larceny-theft (+165.7%); motor vehicle theft (+24.1%). Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics—1977* 485 (1978). In 1977, the percentages of arrests of

tion that the publication of truthful information about the perpetrators of those crimes may subject newspapers to traditionally unconstitutional penalties is, *ab initio,* a totally unacceptable one.

2. The Information Sought to Be Suppressed Is Already Public

In a series of cases decided by this Court in recent years, it has been made clear that while government may try to keep secret what it can, information which is already public may not be later hidden by the state, *nunc pro tunc,* in an effort to act as if the public disclosure had never occurred. That is at the essence of this Court's decision in cases such as *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) and *Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308 (1977). In *Cox,* notwithstanding the strong social interests in personal privacy, the Court held that once the name of a rape victim was placed in public court records, no criminal or civil sanctions could be imposed on those who published or broadcast the name.* In *Oklahoma,* the Court held that once journalists had been permitted to

persons 18 and under as compared to all arrests for the offenses listed above were as follows: murder and nonnegligent manslaughter (9.7%); manslaughter by negligence (11.1%); forcible rape (16.5%); robbery (32%); aggravated assault (16.3%); burglary (51.5%); larceny-theft (42.9%); motor vehicle theft (53%). U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States 1977* 182 (1978).

* In *Cox,* the Court cited the Restatement (Second) of Torts § 652D, comment c (Tent. Draft No. 13, 1967) (now in final form as Restatement (Second) of Torts § 652D, comment b (1977)), which states that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." 420 U.S. at 494. *Cox* itself reserved the question of whether sanctions may ever be imposed for the publication of truthful, but assertedly "private," information, whether obtained from public records or by a newspaper's own investigation. 420 U.S. at 491, 497 n.27.

attend a juvenile hearing, they could not later be enjoined from publishing what they learned.

In both cases, the Court rejected the notion that information which the legislature had sought to keep confidential but had been lawfully learned, could later, once again, be made confidential—or that those who published or broadcast the information could have criminal sanctions imposed upon them. Still more recently, in *Landmark,* notwithstanding strong public policy interests in favor of keeping confidential meetings of Virginia's Judicial Inquiry Commission, the Court held that once the previously secret information—*e.g.,* the name of the juvenile court judge under investigation—was publicly known, neither a member of the public nor the press could be punished for expressing it.

A similar situation is presented by this case. Information was lawfully obtained by journalists by interviewing, *inter alia,* eye-witnesses to a crime, police officials and an assistant district attorney. Perrock's identity was disclosed by police officials to the press—and, presumably, to all others who were interested and had not already spoken to one or more of the students at Hayes Junior High School. To contend, under these circumstances, that the newspapers which learned the information may not print it is Orwellian in its implications;* when all know what happened, but

* The Court may recall the scene in Orwell's *1984* in which the protagonist of the book recalls having found a fragment of an old newspaper clipping which, on its face, demonstrated the falsity of confessions made by political prisoners. He had destroyed the clipping, "a fragment of the abolished past, like a fossil bone which turns up in the wrong stratum and destroys a geological theory," but later considers the implications of a society in which "[t]he past not only changed, but changed continually." G. Orwell, *1984* 62 (Signet ed.). Not the least offensive characteristic of the West Virginia statute is its purposeful effort to destroy history, an effort (unlike Orwell's nightmare world) un-

newspapers are barred from printing it, far more than the credibility (or even the freedom) of the press will dissolve: so, inevitably, will the credibility of our society as a whole. First Amendment law has never before permitted such an eventuality.

3. The Prior Restraint Cannot Serve Its Intended Purpose

As *Nebraska Press Ass'n* itself makes clear, prior restraints may not issue even to protect Sixth Amendment rights unless, *inter alia,* they are "workable," and "would serve [their] intended purpose." (427 U.S. at 565, 569). In this area, they are inherently unworkable for a number of reasons. As a practical matter, such efforts at secrecy simply cannot work in light of realities of life having nothing to do with whether or not newspapers face criminal penalties for publishing the names of alleged juvenile offenders. As this Court observed in its seminal ruling in *In re Gault,* 387 U.S. 1 (1967):

> "[I]t is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard

dertaken in undoubted good faith and for arguably beneficent reasons. As Justice Brandeis once observed:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Olmstead v. *United States,* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

> of the forgotten past.' This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory resolutions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies." (387 U.S. at 24-25) (footnotes omitted).

Accord, McKeiver v. *Pennsylvania,* 403 U.S. 528, 567-68 (1971) (Douglas, J., dissenting).*

Nor is the West Virginia statute "workable" in the sense of possibly accomplishing its desired ends in light of its spotty and far from inclusive coverage. By its terms—and by the interpretation given the statute by petitioners below—the statute applies only to newspapers, excluding from its coverage radio, television, magazines and the wide range of other publications and speech. En-

* *See also* Spalty, *Juvenile Court Record-Keeping,* 4 Colum. Hum. Rights L. Rev. 461 (1972); Edwards & Sagatun, *A Study of Juvenile Record Sealing Practices in California,* 4 Pepperdine L. Rev. 543, 549-51 (1977).

tirely apart from the question of whether such an idiosyncratic selection process by the state as to whose expression it chooses to suppress can survive any equal protection analysis,* the inescapable fact remains that such a statute simply cannot work—and thus cannot possibly pass muster as an exception to the prohibition on prior restraints.**

The undisputed facts in this case are illustrative: at least three radio stations broadcast Perrock's name. Presumably, it was mentioned as well on television. Under such circumstances it can hardly even be urged that the restraint imposed by the statute could accomplish any conceivable purpose.***

There is still a third, and wholly independent, reason that the statute could not possibly fulfill its purpose—one almost identical with facts adverted to in *Nebraska Press Ass'n*. The killing in this case took place in St. Albans, West Virginia, a town of 14,356.† The killing was in a

---

* *See* Section II, *infra*.

** The statute is necessarily underinclusive and hence unworkable for the additional reason that news reports published outside of West Virginia are not within the reach of the prohibition, *cf. Nebraska Press Ass'n*, 427 U.S. at 565-66, 566 n.10.

*** In their brief filed with the West Virginia Supreme Court of Appeals, petitioners argued that West Virginia could not lawfully punish radio and television stations because of pre-emption by the Federal Communications Commission. (Br. pp. 13-14). Whatever the accuracy of this proposition as a matter of law, it does not begin to join issue with the proposition, stated in text, that prior restraints may not issue when they will not work. Moreover, the reluctance of West Virginia even to attempt to limit dissemination of the names of alleged juvenile offenders in magazines, from soap boxes and elsewhere hardly suggests that the social problems allegedly caused by such publications are even serious, let alone grave.

† U.S. Dep't of Commerce, *Census Report—1970*.

junior high school, the only junior high school in St. Albans; it occurred in front of seven eye witnesses. (A. 21) As reported by the Daily Mail:

> "The shooting momentarily sent panic through the neighborhood, and parents who heard about the incident rushed to the school to take their children home. Some parents feared that children who witnessed the shooting would be emotionally upset. Some children were in tears when they met their parents." (A. 13)

Under these circumstances, the language of *Nebraska Press Ass'n* is precisely on point:

> "Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it." (427 U.S. at 567).

4. Alternative Means Are Available to Accomplish the Purposes of the Statute

Another element considered in the *Nebraska Press Ass'n* ruling was whether alternative means were available to accomplish the desired ends of the statute. In *Nebraska Press Ass'n* itself the court concluded that "[w]e cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make a prior restraint unnecessary." (427 U.S. at 569). In this case,

there is absolutely *no* record from which the conclusion can be reached that the statutory scheme embodying both prior restraints and criminal punishments is, in any degree, "necessary" to protect the confidentiality of the identity of accused juvenile offenders. Here, as in *Landmark*, petitioners rely upon nothing more than "assertion and conjecture," 435 U.S. at 841, to support the proposition that criminal sanctions (let alone prior restraints) are required in order to vindicate the statutory purpose.

Protection of a convicted delinquent from the stigmatizing effects of his offense can be accomplished by other, far less constitutionally objectionable means than the imposition of prior restraints (or criminal punishments) upon the press. For example, legislation can and has been enacted prohibiting all discrimination on account of a juvenile record. Such statutes obviate any need for a job applicant with a juvenile record to engage in troublesome lying about his past—with the attendant risk of future problems if his falsehood is discovered—and also protect not just those whose names have been published, but all applicants with juvenile records of which employers may be aware.* West Virginia itself has enacted legislation specifically prohibiting discrimination against persons with juvenile records "in access to, terms of, or conditions of employment, housing, education, credit, contractual rights or otherwise" W.Va. Code 49-5-17(e) (Supp. 1978). There is no basis for concluding that such a statute is not a sufficient guarantee of equal employment opportunities to persons with juvenile records.

* A national task force recently recommended adoption of such a statute, National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 3.27 (1976) (hereafter "Task Force Report").

There are various other means available to the state in furthering its goal of rehabilitating youthful offenders. Treatment programs presumably will offset the criminogenic effects of the "label" with which the offender must contend, whether or not a newspaper has published his name. Job placement services, training programs and community public relations can offset employer prejudice.*

Nor is there any ground for concluding on the basis of the experience of other states that the provisions of the West Virginia statute are necessary to protect the identity of alleged juvenile offenders. As in *Landmark*, it may be said in this case that "the imposition of criminal sanctions" on newspapers for the breach of confidentiality "is not a common characteristic of the state plans. . . ." (435 U.S. at 836). In *Landmark*, that was the Court's conclusion in a context in which over 40 states had judicial commissions which took evidence in secret, but in which only 2 punished the press or public criminally for breaching that confidentiality.

The state-by-state lineup is similar in the instant case. It appears that all 50 states** and the federal govern-

* Social workers and counselors whose job it is to place youthful offenders in employment programs report that they are able to overcome employer resistance to a substantial degree. *See* R. Hardy & J. Cull, *Psychological and Vocational Rehabilitation of the Youthful Delinquent* 167 (1974). *See also* Task Force Report, *supra* at 137.

** Ala. Code tit. 12, §§ 12-15-65(a), 12-15-100 *et seq.* (1977); Alaska Stat. §§ 09.25.120(2), 47.10.070, 47.10.090 (1973, 1975, & Supp. 1977); Alaska Children's R. 12(d)(2), 26; Ariz. Juv. Ct. R. 19; Ark. Stat. Ann. §§ 45-434, 45-442, 45-443 (1977); Cal. Welf. & Inst. Code §§ 676, 827 (West 1972 & Supp. 1978); Cal. Ct. R. 1311; Colo. Rev. Stat. §§ 19-1-107, 19-1-111 (1974); Colo. Juv. Proc. R. 19(b); Conn. Gen. Stat. Ann. §§ 1-19(b)(3)(D), 54-76*l* (West Supp. 1978); 1978 Conn. Legis. Serv., P.A. 78-280, §§ 92, 95 (to be codified at Conn. Gen. Stat. Ann. §§ 51-305, 51-335); *id.*, P.A. 78-318, § 27 (to be codified at Conn. Gen. Stat. Ann. §51-305);

(footnote continued from previous page)

id., P.A. 78-379, § 11 (to be codified at Conn. Gen. Stat. Ann. § 51-319); Conn. Ct. R. 1134; Del. Code Ann. tit. 10, § 972 (1975); Del. Fam. Ct. R. 200, 350, 370; D.C. Code §§ 16-2316(e), 16-2331 *et seq.* (Supp. V 1978); D.C. Juv. Ct. R. 53, 55; Fla. Stat. §§ 39.031, 39.09(1)(c),(4), 39.12 (West Supp. 1978); Ga. Code Ann. §§ 24A-1801(c), 24A-3501 *et seq.* (1976 & Supp. 1978); Haw. Rev. Stat. §§ 571-41, 571-84 (Supp. 1975); Idaho Code §§ 16-1811 (7), 16-1813, 16-1816 (Supp. 1978); Idaho Dist. Ct. R. 21(b), 22(b); Ill. Ann. Stat. ch. 37, §§ 701-20(6), 702-8(3), 702-10, 702-10.1 (Smith-Hurd 1972 & Supp. 1978); Ind. Code Ann. §§ 31-5-2-2, 31-5-7-15 (Burns 1973 & Supp. 1978) (repealed effective Oct. 1, 1979); *id.* §§ 31-6-7-10, 31-6-8-1 (Burns Supp. 1978) (effective Oct. 1, 1979); Iowa Code Ann. §§ 232.27, 232.54 *et seq.* (West 1969 & Supp. 1978) (repealed effective July 1, 1979); 1978 Iowa Legis. Serv., H.F. 248, §§ 19, 77 *et seq.* (effective July 1, 1979); Kan. Stat. §§ 38-822, 45-201 (Supp. 1977); 1978 Kan. Sess. Laws ch. 158, §§ 2, 3 (to be codified in part at Kan. Stat. § 38-805); Ky. Rev. Stat. §§ 208.060(1), 208.340 (1977); La. Rev. Stat. Ann. §§13:1586, 13:1586.1 (West 1968 & Supp. 1978); 1978 La. Sess. Law Serv., Act 172, art. 69 (effective Jan. 1, 1979); Me. Rev. Stat. tit. 15, §§ 3307, 3308 (Supp. 1978); Md. Cts. & Jud. Proc. Code Ann. §§ 3-812(e), 3-828 (Supp. 1978); Mass. Gen. Laws Ann. ch. 119, §§ 60A, 65 (West 1969 & Supp. 1978); Mich. Comp. Laws Ann. §§ 712A.17, 712A.28 (West 1968); Minn. Stat. Ann. §§ 260.155(1), 260.161 (West 1971); Minn. Juv. Ct. R. 11-2, 11-3; Miss. Code Ann. §§ 43-21-19, 43-23-17 (1972); 1977 Miss. Laws ch. 474, § 7 (amending Miss. Code Ann. § 43-23-41); 1975 Miss. Laws ch. 494, § 3 (amending Miss. Code Ann. § 43-21-17); Mo. Ann. Stat. §§ 211.171(5), 211.321 (Vernon 1962 & Supp. 1979); Mo. Juv. Ct. R. 117.02, 122.02, 122.03; Mont. Rev. Codes Ann. §§ 10-1220(5), 10-1230, 10-1231, 10-1241 (Supp. 1977); Neb. Rev. Stat. §§ 43-206.04(2), 43-243 (1974 & Supp. 1978); Nev. Rev. Stat. §§ 62.193 (1), 62.200, 62.270 (1977); N.H. Rev. Stat. Ann. §§ 169:20, 169:22, 169:27, 169:28 (1978); 1978 N.H. Laws ch. 37 (amending N.H. Rev. Stat. Ann. § 169:14); N.J. Stat. Ann. § 2A:4-65 (West Supp. 1978); N.J. Ct. R. 1:38, 5:9-1(a), 5:10-6(b), 5:10-7; N.M. Stat. Ann. § 13-14-28 (Supp. 1977); 1977 N.M. Laws ch. 278, § 11 (amending N.M. Stat. Ann. § 13-14-42); N.Y. Fam. Ct. Act §§ 741 (b), 750(1), 784 (McKinney 1975 & Supp. 1978); N.Y. Crim. Proc. Law §§ 720.15, 720.35, 725.15, 725.20 (McKinney 1971 & Supp. 1978); N.C. Gen. Stat. §§ 7A-285, 7A-287 (1969 & Supp. 1977); N.D. Cent. Code §§ 27-20-24, 27-20-51 *et seq.* (1974 & Supp. 1977); Ohio Rev. Code Ann. §§ 2151.14, 2151.35 (Page 1976); Ohio Juv. Proc. R. 37(B); Okla. Stat. Ann. tit. 10, §§ 1111, 1125, 1127(a), 1506(b) (West Supp. 1978); Or. Rev. Stat. §§ 419.498 (1), 419.567, 419.584 (1977); Pa. Cons. Stat. Ann. tit. 42, §§ 6307,

(footnote continued on next page)

ment* provide, in some fashion or other, for confidentiality of juvenile delinquency proceedings; of the states, only 6

6308, 6336(d) (Purdon 1978 Pamphlet, pt. 1); R.I. Gen. Laws §§ 8-10-21, 14-1-30, 14-1-64 (1970 & Supp. 1977); S.C. Code §§ 14-21-30, 14-21-590(d), 14-21-610, 14-21-810(a)(14) (1977); S.D. Codified Laws §§ 26-8-32, 26-8-33, 26-8-34 (1976); Tenn. Code Ann. §§ 37-224(d), 37-251 *et seq.* (1977); Tex. Fam. Code Ann. tit. 3, §§ 51.14, 54.08 (Vernon 1975); Utah Code Ann. §§ 78-3a-33, 78-3a-55 (1977); Vt. Stat. Ann. tit. 33, §§ 651, 663 (Supp. 1978); Va. Code §§ 16.1-300 *et seq.* (Supp. 1978); Wash. Rev. Code Ann. §§ 13.04.270, 13.04.272, 13.34.110 (Supp. 1978); W. Va. Code §§ 49-7-1, 49-7-3 (1976 & Supp. 1978); 1977 Wis. Laws ch. 354, §§ 47, 53 (to be codified at Wis. Stat. §§ 48.396, 48.31); Wyo. Stat. §§ 14-115.25, 14-115.40 (Supp. 1975); 1976 Wyo. Laws ch. 3, § 1 (amending Wyo. Stat. § 14-115.41).

* Although the *amici* brief submitted on behalf of petitioners urges that the federal statute, 18 U.S.C. § 5038(d)(2) (1976) is similar to West Virginia's (Br. 10-11), the federal statute provides for no criminal penalty for publication, and the import of its language—"neither the name nor picture of any juvenile shall be made public by any medium of public information"—is far from clear. The provision is part of a series clearly designed to safeguard the confidentiality of records by regulating court personnel. The statutory language is not discussed at all in the legislative history. The language from the Senate Report quoted in the *amici* brief merely reflects the inescapable fact that, as this Court has repeatedly recognized, delinquency sanctions and institutional processes themselves have stigmatizing effects. S.Rep. No. 93-1011, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5283, 5321-22; *Breed* v. *Jones*, 421 U.S. 519, 529-31 (1975); *In re Gault*, 387 U.S. 1, 23-25 (1967).

The language in 18 U.S.C. § 5038(d)(2) relating to "any medium of public information" is identical with that proposed in § 33 of the Standard Family Court Act, put forth by the National Council on Crime and Delinquency in 1959. Some history of the Standard Act indicates that it may have been intended to apply to the press; specifically, the comment to § 33 of the Act states that the National Council of Juvenile Court Judges "would prefer" that the entire sentence relating to any "medium of public information" be deleted and that the press voluntarily refrain from publishing the names of juvenile offenders. However, as in the case of 18 U.S.C. § 5038(d)(2), no provision for criminal penalties for the press is proposed in the Standard Family Court Act. And, as is always the case, two unconstitutional statutes are no more constitutionally tolerable than one.

(including West Virginia) prohibit publication by non-parties to the proceedings of the identity of juveniles and set forth criminal penalties for the breach thereof.*

This position of the great majority of the states has been supported by the National Council of Juvenile Court Judges, which has concluded that "there should be no statutory prohibition circumscribing the news media in any way," ** and that reliance should be placed instead on the ability of the press and the juvenile courts amicably to resolve any differences in approach. As summarized by one juvenile court judge:

> "So, it seems that the official organ for juvenile judges and the majority of the Legislatures feel that the press, or all modern mass media for that matter, should be permitted to use discretion with respect to the publication of names. Many other sincere, reputable authorities and some State Legislatures, as noted above, feel that there must be authority in the law and the court to prevent abuses of that right.
>
> • • •
>
> "My personal opinion is that it is better for all concerned to permit mass media to use their discretion with respect to the publication of names. For the court to act as a super-censor in metropolitan areas seems impractical, cumbersome and burdensome; particularly, in view of the deadlines and datelines involved in the communications field. I believe that mass media generally should be commended for their cooperation in withholding from publication the names and other identifying data relating to juveniles. An understanding knowledge, based on full faith and disclosure, will further this acceptance of the practice of voluntary cooperation." (Footnote omitted.)*

The most recent articulation of proposed standards relating to juvenile records and information systems has, as well, advocated methods of protecting confidentiality of juvenile records without any direct restraints on publication. The IJA-ABA Juvenile Justice Standards Project chaired by Judge Irving R. Kaufman, after an extended study, eschewed the approach of the 6-state minority, recommending instead limitations on access to case files to specified individuals.**

---

* The five states' statutes in addition to that of West Virginia are as follows: Colo. Rev. Stat. § 19-1-107(6) (1974); Ga. Code Ann. § 24A-3503(g)(1) (1976); N.H. Rev. Stat. Ann. §§ 169:27, 169:28 (1978); S.C. Code § 14-21-30 (1977); S.D. Codified Laws § 26-8-34 (1976). All five states permit publication only upon the issuance of a prior court order.

Ark. Stat. Ann. § 45-443 (1977) prohibits publication by the media but does not provide for any penalty. Five states and the District of Columbia prohibit use of information derived directly or indirectly from court records or information acquired in the course of official duties, but do not prohibit publication of information derived from other sources. Ala. Code tit. 12, §§ 12-15-100(d), 12-15-101(c) (1977); D.C. Code § 16-2336 (Supp. V 1978); N.J. Stat. Ann. § 2A:4-65(d) (West Supp. 1978); N.M. Stat. Ann. § 13-14-42(D) (amended by 1977 N.M. Laws ch. 278, § 11); Ohio Juv. Proc. R. 37(B); Va. Code § 16.1-309 (Supp. 1978). Three states expressly permit or purport to require publication of the identity of a juvenile when a serious crime has been committed (Delaware, New Jersey, Pennsylvania) and four states (Alaska, Georgia, Mississippi, Nevada) do so if the juvenile has a prior record.

** Conway, *Publicizing the Juvenile Court: A Public Responsibility*, 16 Juv. Ct. Judges J. 21 (1965).

* Riederer, *Secrecy or Privacy? Communication Problems in the Juvenile Court Field*, 17 J. Mo. Bar Ass'n 66, 70 (1961).

** The Project was jointly sponsored by the Institute for Judicial Administration and the American Bar Association, *see* IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Juvenile Records and Information Systems* 117 (Tent. Draft 1977) ("Standard 15.2 allocates the responsibility to juvenile courts to limit access to their own records, thereby avoiding the issue of

Whatever else may be said of the dispute between those who favor and disfavor direct limitations on the press' ability to print names of alleged juvenile offenders, one fact is clear: not only is West Virginia one of a small minority of states in its statutory approach, but there is absolutely no basis for concluding—on this record or otherwise—that methods short of the prior restraint-criminal sanction approach of West Virginia are not a fully adequate substitute for the statute at issue here. Under such circumstances the statute cannot begin to withstand constitutional scrutiny.

II.

West Virginia Code 49-7-3 Violates the Equal Protection Clause of the Fourteenth Amendment in Prohibiting Only Newspapers From Identifying Juvenile Offenders

Petitioners have previously conceded that the West Virginia statute prohibits newspapers, and newspapers only, from identifying juvenile offenders.* Magazines may be printed freely; leaflets may be distributed freely; witnesses, parents, teachers, the PTA, local ministers, and all other individuals and groups may identify juvenile offenders if they learn their names. And—as occurred in this case—radio and television broadcasters remain free to report what they learn.

---

exercising direct control over the contents of a publication. . . .") Other standard-setting groups have not recommended imposing restraints on the press, *see* U.S. Dep't of Health, Education and Welfare, *Legislative Guide for Drafting Family and Juvenile Court Acts* § 46 (1969); Uniform Juvenile Court Act (1968); Task Force Report, *supra*, Standard 5.13 (1976).

* Br. in Opp. to Writ of Prohibition, pp. 13-15.

All else aside, there is no way such a statute can meet the requirements of the equal protection clause. It hardly needs extensive citation to demonstrate that when parties exercise a constitutional right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original). *Cf. Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7 (1972); *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968).

In this case, far from any disparate treatment being necessary to accomplish the ends of the statute, that treatment itself frustrates the statutory goal. Surely, there is no difference between the supposed effect, in terms of the state's alleged purpose of sealing off a juvenile offender's identity, between a magazine or radio and television broadcasts and newspaper reports. Nor is there likely to be any difference in effect between open discussions of a crime by individuals and groups in the offender's community and newspaper reports. If anything, the offender may well be affected more by the opinions and attitudes of those people in his community than by the larger community of people who neither know him nor are interested in him.

Petitioners have previously urged that West Virginia cannot, consistent with federal regulation of radio and television, regulate the content of the broadcast media. Whatever the accuracy of this allegation, it is hardly an answer to a body of law which requires a showing of "necessity" before unequal treatment may be meted out. It is hardly necessary to treat newspapers differently when there is nothing to be gained by doing so.

CONCLUSION

While this case arises in the context of the killing of one juvenile by another, it raises no questions and requires no ruling from the Court as to the continued viability of the juvenile court system itself. So far as this case goes, West Virginia may continue to treat its juvenile offenders as it chooses, so long as there is no infringement of the constitutional rights of the juveniles themselves.

There is but one constitutional right at issue in this case. It is the right of the newspapers of this country to print the news that they learn—and to do so free of advance censorship. Given the many prior rulings of this Court, we respectfully submit that the case is not a difficult one. The decision below should be affirmed.

Respectfully submitted,

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322

RUDOLPH L. DI TRAPANO
DI TRAPANO, MITCHELL, LAWSON & FIELD
604 Virginia Street, East
Charleston, West Virginia 25301

Attorneys for Respondents

Dated: January 29, 1979

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC., ET AL.,
Respondents

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; NATIONAL PRESS CLUB; ASSOCIATED PRESS MANAGING EDITORS; WEST VIRGINIA PRESS ASSOCIATION; ILLINOIS PRESS ASSOCIATION; AND CLARKSBURG PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE, AND BRIEF *AMICI CURIAE*.

RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
DAVID M. RICKLESS

1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

THE CASILLAS PRESS, INC. – 1717 K Street N. W. – Washington, D. C. – 223-1220

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC., ET AL.,
Respondents

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; NATIONAL PRESS CLUB; ASSOCIATED PRESS MANAGING EDITORS; WEST VIRGINIA PRESS ASSOCIATION; ILLINOIS PRESS ASSOCIATION; AND CLARKSBURG PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE.

The American Society of Newspaper Editors, the Radio Television News Directors Association and others, whose interest is set forth below with particularity, respectfully move this Court, pursuant to Supreme Court Rule 42(3), to file the accompanying brief as *amici curiae* in support of affirmance of the decision of the Supreme Court of Appeals

of West Virginia. The attorneys for the Respondents have consented to the filing of this brief.[1] Although the attorney for the Petitioners has given his consent to the filing of an *amicus* brief supporting reversal of the court below, he has failed to respond to the requests of the *amici* for his consent.

Amici are organizations whose members consist of publishers, broadcasters, editors, and journalists throughout the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Radio Television News Directors Association includes approximately 1500 members who supervise, gather, report and edit news and other public affairs information that is broadcast throughout the nation.

The National Newspaper Association is a national trade association of 6200 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The National Association of Broadcasters is a nonprofit association of radio and television broadcast stations and networks. Its membership includes 2607 AM stations, 1981

[1]Letters of consent from the attorneys for the Respondents have been filed with the Clerk of this Court simultaneously with this motion.

FM stations, 557 television stations and the major nationwide commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi is a society of students and practitioners of journalism. It has over 158 student chapters, 134 professional chapters, and more than 35,000 members, among whom the most distinguished journalists in the United States are included.

The Reporters Committee for Freedom of the Press is a nonprofit unincorporated legal defense and research fund devoted to the protection of the First Amendment and freedom of information rights of working press personnel of all media.

The National Press Club is the largest press club in the United States with over 4800 members in 49 states and the District of Columbia.

The Associated Press Managing Editors is an organization of 600 editors affiliated with the Associated Press, which is the largest news collection organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The West Virginia Press Association represents approximately 70 daily and weekly newspaper publishers throughout West Virginia.

The Illinois Press Association is a trade association representing approximately 700 daily and weekly papers throughout the state. Founded in 1865, it is the nation's largest press association.

The Clarksburg Publishing Company is the publisher of *The Clarksburg Exponent*, *Clarksburg Telegram*, and *Sunday Exponent-Telegram*, published in West Virginia, with a combined circulation of approximately 30,000.

Amici believe that the information published in the instant case is necessary for the people to make informed judgments concerning one aspect of the system of government under which they live. Hence, the publication in question involves those values that lie at the very core of the First Amendment and are protected by a rule of constitutional privilege against any governmental infringement. The existence of a free press depends on the ability to publish without first having obtained official imprimatur. Without this limitation on governmental power, all the other protections of the First Amendment, which this Court has articulated throughout its nearly two centuries of existence, would be reduced to chimera.

Because of the importance of the issues presented to this Court in the instant case, the above-listed *amici* desire to present their views to this Court for its assistance.

WHEREFORE, *amici* respectfully request this Court to grant this motion and permit them to file their brief *amici curiae* attached hereto and submitted herewith.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
DAVID M. RICKLESS

1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

January 25, 1979

Of Counsel:

J. LAURENT SCHARFF, ESQUIRE
PIERSON, BALL & DOWD
1000 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
Attorney for Radio Television News Directors Association

ERWIN G. KRASNOW, ESQUIRE
1771 N Street, N.W.
Washington, D.C. 20036
Attorney for National Association of Broadcasters

W. TERRY MAGUIRE, ESQUIRE
1627 K Street, N.W.
Suite 400
Washington, D.C. 20006
Attorney for National Newspaper Association, West Virginia Press Association, Illinois Press Association, and Clarksburg Publishing Company

JACK LANDAU, ESQUIRE
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorney for Reporters Committee for Freedom of the Press

TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

INTEREST OF THE *AMICI* 2

ARGUMENT 5

I. WEST VIRGINIA CODE SECTION 49-7-3 CONSTITUTES A PRIOR RESTRAINT ON PUBLICATION 5

II. THE FIRST AMENDMENT CREATES A CONSTITUTIONAL RULE OF PRIVILEGE UNDER WHICH RESPONDENTS' PUBLICATIONS MAY NOT BE SUBJECT TO PRIOR RESTRAINT 6

A. AS RESPONDENTS' PUBLICATIONS ARE TRUTHFUL, ACCURATE, FACTUAL REPORTS INVOLVING AN ASPECT OF THE FUNCTIONING OF GOVERNMENT, AND THEIR INFORMATION WAS LAWFULLY OBTAINED, RESPONDENTS ARE PRIMA FACIE ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT 6

B. BECAUSE RESPONDENTS' PUBLICATIONS MERIT PRIMA FACIE CONSTITUTIONAL PROTECTION, THE STATE MAY NOT IMPOSE A PRIOR RESTRAINT ON THOSE PUBLICATIONS EXCEPT BY DISCHARGING A PARTICULARLY HEAVY BURDEN TO SHOW THAT ITS LAW COMES WITHIN A SUBSTANTIVE EXCEPTION TO THE RULE AGAINST PRIOR RESTRAINT, DOES NOT ALLOW THE OFFICIAL WHO ADMINISTERS THE LAW TOO GREAT DISCRETION, AND PROVIDES FOR MEANINGFUL JUDICIAL REVIEW. 12

1. Respondents' Publications Do Not Fall Within One of the Substantive Exceptions to the Rule Against Prior Restraint 13

Page

2. West Virginia Code Section 49-7-3 is Unconstitutional in That It Imposes No Standards on a Judge's Discretion to Permit or Forbid Publication and Does Not Provide for Expedited Judicial Review. 16

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Page

CASES:

Aptheker v. *Secretary of State*,
378 U.S. 500 (1964) 15

Bantam Books, Inc. v. *Sullivan*,
372 U.S. 58 (1963) 12

Carroll v. *President and Comm'rs*,
393 U.S. 175 (1968) 12

Cox Broadcasting Corp. v. *Cohn*,
420 U.S. 469 (1975) 8, 9, 10 n.2

Craig v. *Harney*,
331 U.S. 367 (1947) 9, 10

Curtis Publishing Co. v. *Butts*,
388 U.S. 130 (1967) 9

Estes v. *Texas*,
381 U.S. 532 (1965) 8

Freedman v. *Maryland*,
380 U.S. 51 (1965) 12, 17

Gertz v. *Robert Welch, Inc.*,
418 U.S. 323 (1974) 9

Gregg v. *Georgia*,
428 U.S. 153 (1976) 15

Grosjean v. *American Press Co.*,
297 U.S. 233 (1936) 8

Houchins v. *KQED, Inc.*,
98 S. Ct. 2588 (1978) 8, 9

Haynes v. *Mayor and Council*,
425 U.S. 610 (1976) 12

Page

In re Gault.
387 U.S. 1 (1967) 7, 7 n.1, 13, 14

In re Winship.
397 U.S. 358 (1970) 7 n.1

Kingsley Books, Inc. v. *Brown.*
354 U.S. 436 (1957) 12

Kent v. *United States.*
383 U.S. 541 (1966) 7

Landmark Communications, Inc. v. *Virginia.*
435 U.S. 829 (1978) 6, 7, 9, 10, 13 n.3, 15

Malinski v. *New York.*
324 U.S. 401 (1945) 18

Lovell v. *City of Griffin.*
303 U.S. 444 (1938) 12, 18

McKeiver v. *Pennsylvania.*
403 U.S. 528 (1971) 7, 7 n.1, 14

Miami Herald Publishing Co. v. *Tornillo.*
418 U.S. 241 (1974) 10, 11

Mills v. *Alabama.*
384 U.S. 214 (1966) 7, 9

Near v. *Minnesota ex rel. Olson.*
283 U.S. 697 (1931) 5, 6, 13

Nebraska Press Ass'n v. *Stuart.*
427 U.S. 539 (1976) 5, 6, 10 n.2, 12, 13 n.3, 14, 15, 17, 18

New York Times Co. v. *Sullivan.*
376 U.S. 254 (1964) 9

New York Times Co. v. *United States.*
403 U.S. 713 (1971) 6, 12, 13, 16, 17, 18

Page

Oklahoma Publishing Co. v. *District Court.*
430 U.S. 308 (1977) 6, 9

Pell v. *Procunier.*
417 U.S. 817 (1974) 7

Pennekamp v. *Florida.*
328 U.S. 331 (1946) 8

Police Dep't v. *Mosley.*
408 U.S. 92 (1972) 15

Sheppard v. *Maxwell.*
384 U.S. 333 (1966) 9

Shuttelsworth v. *City of Birmingham.*
394 U.S. 147 (1969) 12, 16

Southeastern Promotions, Ltd. v. *Conrad.*
420 U.S. 546 (1975) 5, 12, 18

Thornhill v. *Alabama.*
310 U.S. 88 (1940) 7, 8

Times Film Corp. v. *City of Chicago.*
365 U.S. 43 (1961) 5

Walker v. *City of Birmingham.*
388 U.S. 307 (1967) 6

Williams v. *Rhodes.*
393 U.S. 23 (1968) 15

Wood v. *Georgia.*
370 U.S. 375 (1962) 8

Government of Virgin Islands v. *Broadhurst.*
285 F. Supp. 831 (D.V.I. 1968) 14

STATUTES:

West Virginia Code § 49-7-3 . . . . . 5, 16

Page

MISCELLANEOUS:

2 T. Cooley, Constitutional Limitations (8th ed. 1927) 8

T. Emerson, The System of Freedom of Expression (1970) 5

G. Hunt ed., 1910 9 Writings of James Madison, Letter from James Madison to W.T. Barry (Aug. 4, 1822) 11

President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) 7

Restatement (Second) of Torts § 652 D (Tent. Draft No. 13, Apr. 27, 1967) 10 n.2

IJA/ABA Juvenile Justice Standards Project, 57 B.U.L. Rev. 617 (1977) 8

Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970) 13, 17 n.5

Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281 (1967) 7

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC., ET AL.,
Respondents

THE HONORABLE ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; NATIONAL PRESS CLUB; ASSOCIATED PRESS MANAGING EDITORS; WEST VIRGINIA PRESS ASSOCIATION; ILLINOIS PRESS ASSOCIATION; AND CLARKSBURG PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE.

INTRODUCTORY STATEMENT

The American Society of Newspaper Editors, the Radio Television News Directors Association and others, whose interest is set forth below with particularity, hereby submit this joint brief as *amici curiae* in support of affirmance of

the decision of the Supreme Court of Appeals of West Virginia. The *amici*, believe that the question presented in this case is clear — whether West Virginia Code § 49-7-3, which outlaws newspaper, but not broadcast, publication of the name of a juvenile delinquent without prior approval by a court, and which prescribes no standards to govern the discretion exercised to permit such publication, constitutes a prior restraint on freedom of the press in violation of the First Amendment.

We submit and will show that the issue in this case implicates the ability of the press in the United States to function as a free, independent and effective institution. We, therefore, urge this Court's affirmance of the decision reached below.

INTEREST OF THE *AMICI*

Amici are organizations whose members consist of publishers, broadcasters, editors, and journalists throughout the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Radio Television News Directors Association includes approximately 1500 members who supervise, gather, report and edit news and other public affairs information that is broadcast throughout the nation.

The National Newspaper Association is a national trade association of 6200 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The National Association of Broadcasters is a nonprofit association of radio and television broadcast stations and networks. Its membership includes 2607 AM stations, 1981 FM stations, 557 television stations and the major nationwide commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi is a society of students and practitioners of journalism. It has over 158 student chapters, 134 professional chapters, and more than 35,000 members, among whom the most distinguished journalists in the United States are included.

The Reporters Committee for Freedom of the Press is a nonprofit unincorporated legal defense and research fund devoted to the protection of the First Amendment and freedom of information rights of working press personnel of all media.

The National Press Club is the largest press club in the United States with over 4800 members in 49 states and the District of Columbia.

The Associated Press Managing Editors is an organization of 600 editors affiliated with the Associated Press, which is the largest news collection organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The West Virginia Press Association represents approximately 70 daily and weekly newspaper publishers throughout West Virginia.

The Illinois Press Association is a trade association representing approximately 700 daily and weekly publishers throughout the state. Founded in 1865, it is the nation's largest press association.

The Clarksburg Publishing Company is the publisher of *The Clarksburg Exponent*, *Clarksburg Telegram*, and *Sunday Exponent-Telegram*, published in West Virginia, with a combined circulation of approximately 30,000.

Amici believe that the information published in the instant case is necessary for the people to make informed judgments concerning one aspect of the system of government under which they live. Hence, the publication in question involves those values that lie at the very core of the First Amendment and are protected by a rule of constitutional privilege against any governmental infringement. The existence of a free press depends on the ability to publish without first having obtained official imprimatur. Without this limitation on governmental power, all the other protections of the First Amendment, which this Court has articulated throughout its nearly two centuries of existence, would be reduced to chimera.

The Supreme Court of Appeals of West Virginia has heeded the admonitions of this Court. Faithful to the dictates of the First Amendment, that court has removed a legislatively imposed barrier on the ability of the press to freely report to the public information on one aspect of the state's system for administering justice. *Amici* believe that to sanction this limitation would threaten the ability of the press to inform the public about a vital aspect of this system and ultimately its ability to inform the public on all matters needed for the people to make informed judgments on their system of government. Hence, *amici* submit this brief to urge this Court to vindicate their interests, and those of the public that the press serves, against constitutionally prohibited governmental action.

ARGUMENT

I. WEST VIRGINIA CODE SECTION 49-7-3 CONSTITUTES A PRIOR RESTRAINT ON PUBLICATION.

The manner in which the Court states the question presented in this case — whether the statute creates a prior restraint that violates the First Amendment — suggests that it harbors doubt about the statute's identity as a prior restraint. *Amici* submit that under the analysis of this Court in recent cases, no doubt can remain on this question.

The classic model of a prior restraint is a system under which publication is prohibited without advance approval by an official. T. Emerson, The System of Freedom of Expression 505 (1970); *see Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 55-56 (1961) (Warren, C.J., dissenting). The identifying mark of a prior restraint is its censorship effect; officials have the power to interdict or delay speech before its expression. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 552-53 (1975). West Virginia Code section 49-7-3 does not outlaw all newspaper publications of delinquents' names, only those publications that are not first authorized by a court. Clearly, then, that statute is a prior restraint.

The only distinction between the statute in question and the more usual form of prior restraint is that a judge rather than an executive official administers the restraint. But as this Court's decisions abundantly demonstrate, it is functionally irrelevant to the purposes of the First Amendment whether an executive official or a court administers the requirement for advance approval. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The effect upon speech is identical; sanctions are imposed not because the message is

illegal, but because the message is published without permission. Indeed, if prior application must be made to the judiciary, the restraint upon speech could be intensified. Such a restraint is often administered through, or reinforced by, an injunction, and the validity of an injunctive restraint on publication cannot be challenged at a contempt hearing after the injunction has been violated. *See Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *cf. Nebraska Press Ass'n* v. *Stuart*, *supra* at 559. Hence, whether application must be sought from executive officials or the judiciary, is, under this Court's decisions, a distinction without a difference. *See, e.g., Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n* v. *Stuart*, *supra; New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam); *Near* v. *Minnesota ex rel. Olson*, *supra*.

II. THE FIRST AMENDMENT CREATES A CONSTITUTIONAL RULE OF PRIVILEGE UNDER WHICH RESPONDENTS' MAY NOT BE SUBJECT TO PRIOR RESTRAINT.

A. As Respondents' Publications are Truthful, Accurate, Factual Reports Involving an Aspect of the Functioning of Government, and Their Information Was Lawfully Obtained, Respondents are Prima Facie Entitled to the Protection of the First Amendment.

Through the enactment of section 47-7-3, West Virginia has made illegal the newspaper publication of the name of a delinquent child without prior court permission. *Amici* assert that the publication of this information fully merits complete constitutional protection, at very least when the publisher did not employ illegal means to obtain the delinquent's name. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837 (1978). Central to *amici*'s contention is that Respondents' publications are imbued with three attributes that this Court has identified as salient features in its decisions extending First Amendment protection to both published material and speech.

First. The juvenile justice system is clearly both a "governmental affair," *see Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *cf. Landmark Communications, Inc.* v. *Virginia*, *supra* at 837-39, and a matter of public concern and importance, *cf. Pell* v. *Procunier*, 417 U.S. 817, 830 n.7 (1974); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940). Juvenile courts were established as an entity of the judicial system separate from the criminal courts on the theory that delinquent children should not be subjected to the harshness of the criminal process. *In re Gault*, 387 U.S. 1, 14-16 (1967); *Kent* v. *United States*, 383 U.S. 541, 554-55 (1966); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281, 282 (1967). Hence an article on the juvenile justice system clearly falls within the *Mills* definition of discussions of "governmental affairs," which covers discussion of the structure and form of government and the manner in which government is or should be operated. 384 U.S. at 218-19.[1] Moreover, because of the disappointing results realized by the juvenile justice system, *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543-45 (1971); *Kent* v. *United States*, *supra* at 555-56, the system has come under a torrent of criticism. *E.g.*, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967). The result has been ever increasing pressure for change and for the trial of many youths as adults. Clearly, then, the proper functioning of the juvenile

[1] By applying the due process clause to the procedures used in juvenile court, *e.g., In re Winship*, 397 U.S. 358 (1970); *In re Gault*, *supra; see McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), this Court has recognized the juvenile justice system as a function of state government.

justice system is a matter of great public concern. *See generally IJA/ABA Juvenile Justice Standards Project*, 57 B.U.L. Rev. 617 (1977).

The protection of discussion of governmental affairs and matters of public concern as a major purpose of the First Amendment has been a constant theme running through this Court's opinions. For example, in *Thornhill* v. *Alabama*, 310 U.S. at 101-02, the court proclaimed that at very least freedom of speech embraced the truthful, public discussion of "all matters of public concern without previous restraint or fear of subsequent punishment," to adequately supply "the public need for information and education with respect to significant issues of the times." *Accord*, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 230 (1936). *See also* 2 T. Cooley, Constitutional Limitations 885 (8th ed. 1927). The need to freely discuss society's problems, protected by the First Amendment, overcomes even the need for courts to restrain out-of-court attacks on the conduct of their judicial affairs. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946).

Concomitantly, the Court has voiced the recognition that in modern society individuals have only limited time and resources with which to observe for themselves the operations of government. Consequently, they must rely on the media as their "eyes and ears," *Houchins* v. *KQED, Inc.*, 98 S. Ct. 2588, 2594 (1978) (plurality opinion), to digest and present the facts of those operations, *Estes* v. *Texas*, 381 U.S. 532, 539 (1965). Especially with respect to judicial proceedings, "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975). Not without justification has this Court regarded the press as "the handmaiden of effective judicial administration . . . guard[ing] against the

miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966); *cf. Mills* v. *Alabama*, 384 U.S. at 219.

Second. These publications are, beyond dispute, truthful and accurate descriptions of the events that transpired. The functions of free speech and a free press are so fundamental that this Court has extended extraordinary constitutional protection to false statements of fact concerning government officials and public figures. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *cf. Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Hence, it would be the height of irony for the Court to deny protection to publishers of truthful statements of governmental affairs. *Cf. Landmark Communications, Inc.* v. *Virginia, supra; Cox Broadcasting Corp.* v. *Cohn, supra.*

Third. The means by which the delinquent's name was procured brings Respondents within the protection of the First Amendment; they relied primarily on public officials who knew the delinquent's name. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491, 495, this Court held that the press could not be subject to civil liability for publishing information it obtained through a court record. *Cf. Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Logically, however, protection for publishing material obtained from public sources cannot be limited to that obtained from court records. *See Oklahoma Publishing Co.* v. *District Court*, 430 U.S. at 310 (information was placed in the public domain). Indeed, in *Landmark Communications Inc.* v. *Virginia, supra*, the material could only have come from a public official or other state employee. Yet the Court held that publishing the information so obtained could not be punished consistent with the First Amendment. The plurality opinion in *Houchins* v. *KQED, Inc.*, 98 S. Ct. at 2594, synthesized these and other cases, concluding that

"the government cannot restrain communication of whatever information the media acquires — and which they elect to reveal."

Altogether, *Houchins, Oklahoma Publishing, Landmark* and *Cohn* hold that if the government has a legitimate expectation of confidentiality, it must ensure that confidentiality by withholding that information from the public. These cases stand for the proposition that once that information has escaped the confines of the government circle and found its way into the public domain, the press may publish it with impunity, at least so long as the press used no illegal means to obtain that information. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 837; *Craig v. Harney*, 331 U.S. at 374.[2]

The West Virginia statute acutely undermines the ability of the press to serve the functions in a free society that this Court has recognized as vital. In addition to its immediate effect is the potential for abuse that such a ruling would have. A ruling by this Court upholding the West Virginia statute will encourage local jurisdictions to try to shield various parts of their operations from disclosure by imposing punishment on the press for publishing confidential information.

Such a decision could represent a first intrusion of government into the function of newspaper editors — to decide what will go into a newspaper. *Miami Herald Publishing*

[2]Moreover, in this case, the name of the delinquent was a matter of general public knowledge. It had been broadcast over three radio stations. *Cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 567; *id.* at 595-56 (Brennan, J., concurring); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 493-94, *quoting* Restatement (Second) of Torts § 652D (Tent. Draft No. 13, Apr. 27, 1967).

It would be ironic that if the Court upholds the West Virginia statute, the privacy interest of a rape victim will not protect her name from publication while that of the alleged rapist will be protected if he is a juvenile, even if both names are in the public domain.

Co. v. *Tornillo*, 418 U.S. 241, 258 (1974). The Court there stated:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation can be exercised consistent with First Amendment guarantees . . . as they have evolved to this time.

Id. at 258.

The case before the Court presents the other side of the coin from *Tornillo*. Rather than indirectly inhibiting the vital functions of the press, the state reduces the coverage of governmental affairs by directly prohibiting the publishing of information it does not wish the public to receive. Thus the ultimate effect of such a law is to sanction direct government regulation of the content of a newspaper, to permit a state to do directly what it cannot do indirectly. In vitiating *Tornillo*, this Court would set out on a path that would lead to "[a] popular Government without popular information, or the means of acquiring it," which Madison noted, "is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 Writings of James Madison 103 (G. Hunt ed. 1910).

B. BECAUSE RESPONDENTS' PUBLICATIONS MERIT PRIMA FACIE CONSTITUTIONAL PROTECTION, THE STATE MAY NOT IMPOSE A PRIOR RESTRAINT ON THOSE PUBLICATIONS EXCEPT BY DISCHARGING A PARTICULARLY HEAVY BURDEN TO SHOW THAT ITS LAW COMES WITHIN A SUBSTANTIVE EXCEPTION TO THE RULE AGAINST PRIOR RESTRAINT, DOES NOT ALLOW THE OFFICIAL WHO ADMINISTERS THE LAW TOO GREAT DISCRETION, AND PROVIDES FOR MEANINGFUL JUDICIAL REVIEW.

This case thus involves a statutorily imposed prior restraint that impacts directly upon the exercise of fundamental First Amendment rights. All prior restraints come before this Court presumptively unconstitutional. *E.g., New York Times Co.* v. *United States*, 403 U.S. at 714; *Carroll* v. *President and Comm'rs*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). The state must bear a heavy burden to justify the imposition of such a restraint. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 545, 558, and must demonstrate that its regulation affects only those substantive matters that this Court has identified as exceptions to the First Amendment rule against prior restraints. *Id.* at 592 (Brennan, J., concurring); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. at 559. Even if the state can bear this burden successfully, it must provide standards that impose strict limitations on the discretion of the official administering the restraint, *e.g., Hynes* v. *Mayor and Council*, 425 U.S. 610, 616-18 (1976); *Shuttelsworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938), "procedural safeguards designed to obviate the dangers of a censorship system," *e.g., Southeastern Promotions, Ltd.* v. *Conrad*, *supra* at 559-62; *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), and an opportunity for prompt and meaningful judicial review with the burdens of going forward and proof on the government, *Freedman* v. *Maryland*, *supra*, at 58; *see Bantam Books, Inc.* v. *Sullivan*, *supra* at 70-71; *cf. Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-42 (1957). *See generally* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). *Amici* submit that Petitioners have not, indeed cannot, satisfy their burden.

1. Respondents' Publications Do Not Fall Within One of the Substantive Exceptions to the Rule Against Prior Restraint.

The First Amendment's protection against prior restraint is broad and the exceptions to the rule correspondingly narrow; there are only three. A publication may be subject to prior approval when it implicates the need to protect "the primary requirements of decency . . . against obscene publications" or the security of "community life . . . against incitements to acts of violence and the overthrow by force of orderly government . . . ." *Near* v. *Minnesota ex rel. Olson*, 283 U.S. at 716. The third exception involves the suppression of military information when the nation is at war. *Id.*; *cf. New York Times Co.* v. *United States*, *supra*.

It belabors the obvious to state that none of these exceptions apply to the case bar. As its sole interest,[3] the Petitioner alludes to this Court's statement in *In re Gault*, 387 U.S. at 25, that

> there is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide for the confidentiality of records of police contacts and court action relating to juveniles.

[3]Here the state does not advance an interest in the delinquent's receiving a fair trial. *Cf. Nebraska Press Ass'n* v. *Stuart*, *supra*. Indeed, it could not advance such an interest because juvenile trials are conducted to judges, whom this Court assumes will act responsibly to "ignore the public clamor or media reports and editorials in reaching their decisions . . . ." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 839.

Relying on *Government of Virgin Islands* v. *Broadhurst*, 285 F. Supp. 831 (D.V.I. 1968), the Petitioner argues that the limitations placed upon the press were justified in light of the interest of rehabilitating juvenile offenders.

In short, Petitioners are asking this Court to create a new exception to the rule against prior restraints for the names of juvenile delinquents. *Amici* most strenuously assert that such an exception to one of the premier protections of a free press in this country would be most inappropriate. In *Nebraska Press*, the state effectively invited the Court to engraft another exception on the prior restraint rule to protect the right to a fair trial guaranteed by the Sixth Amendment. 427 U.S. at 594 (Brennan, J., concurring). The Court, however, refused to order the priority among constitutional rights. *Id.* at 561 (majority opinion). In the present case, there is not even a possible conflict between constitutional rights; the conflict is between a fundamental constitutional right and a state created remedy to a perceived evil.

Even if an interest of less-than-fundamental constitutional importance could ever support an exception to the First Amendment rule against prior restraints, the Petitioners have failed to show by specific facts that even a statute requiring all media that wish to publish names of delinquents to submit such publications for prior approval would necessarily, or even arguably, advance the cause of juvenile rehabilitation. Indeed, this Court has indicated its doubt that juvenile proceedings complete with the mantle of secrecy, has advanced the cause of juvenile rehabilitation one iota. *McKeiver* v. *Pennsylvania*, 403 U.S. at 543-45; *In re Gault*, 387 U.S. at 17-20. Thus, even if juvenile rehabilitation were an interest sufficient to subordinate fundamental First Amendment rights to the shackles of a prior restraint, the state has failed to produce "actual facts" to demonstrate that the publication of delinquents'

names present a clear and present danger to that interest. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. at 842-44.

Moreover, even when a state's interest is sufficient to restrict First Amendment freedoms, its statute must be framed to utilize the least restrictive means that necessarily furthers only that interest. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *see Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70. As *amici* have already noted, *see* pp. 9-10 *supra*, *Houchins*, *Oklahoma Publishing*, *Landmark Communications* and *Cohn* taken altogether require the state to maintain confidentiality by withholding the information for which it seeks secrecy from the public rather than punishing its disseminators or restraining its dissemination once the information has reached the public domain. That approach is entirely consistent with the *Gault* dictum. Whether there is an interest in rehabilitation sufficient to support the state statute in question, *cf. Gregg* v. *Georgia*, 428 U.S. 153 (1976) (upholding death penalty), when such a less restrictive means is available, indeed is constitutionally mandated, denying the press the protection of the First Amendment would fly in the face of nearly 200 years of constitutional adjudication. Here, as in *Nebraska Press*, the information under the prior restraint was already public knowledge. Having reached the attention of the public, that information may no longer be shielded from publication.

Finally, the statute suffers from the constitutionally prohibited infirmity of according unequal treatment among the media based on content to protected First Amendment interests. *See Police Dep't* v. *Mosley*, 408 U.S. 92, 94-96, 99-102 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). The statute reaches publication but makes no attempt to require prior approval of broadcast of the identical information. The Petitioners can hardly claim that its disparate treatment of newspapers necessarily furthers its

asserted interest. The statute prohibits *only* newspaper publication. The state has not attempted to show, indeed it could not show consistent with common sense, that suppressing only newspaper publication, while permitting broadcast, or other media circulation, of delinquents' names will result in juvenile rehabilitation. For that reason the statute must fall as being underinclusive.

2. West Virginia Code Section 49-7-3 is Unconstitutional in That It Imposes No Standards on a Judge's Discretion to Permit or Forbid Publication and Does Not Provide for Expedited Judicial Review.

Under West Virginia Code section 49-7-3, a judge may grant or withhold permission to publish the juvenile's name for any reason or no reason at all. His authority is completely unfettered. Thus in a case like this, when the information has already reached the public and the confidentiality provision would serve no further purpose, a judge may still withhold permission to disclose the name, thus making its newspaper publication punishable. Such unfettered discretion has been heretofore anathema. *See, e.g., Shuttlesworth* v. *City of Birmingham*, 394 U.S. at 150-51 & n.2.

The statute also contains significant procedural defects. The fact that a judge first passes upon a newspaper's request to publish the juvenile's name does not, in this case, answer this Court's concern with procedural safeguards. A newspaper must present its petition to the court that has jurisdiction over the delinquent. Thus the judge might not be a disinterested adjudicator; the judge would have the power to suppress a name the revelation of which would be embarassing to him. *Cf. New York Times Co.* v. *United States*, 403 U.S. at 724 (Douglas, J., concurring). If permission to publish is refused, the newspaper has the burden of petitioning for review of that decision. This Court clearly requires that once permission is denied, the state must vindicate the validity of the prior restraint by seeking judicial

affirmance of that decision. *Freedman* v. *Maryland*, 380 U.S. at 58-59, and it bears the burden of showing that publication should be restrained. Yet, should the newspaper lose under the statute at issue here, it, not the state, would bear the burden of instituting the appeal and the burden of proof on appeal. *Id.*

Furthermore, no provision guarantees that such a petition will result in prompt review. Time is of the essence in publishing newsworthy events. *See Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1328-29 (1975) (Blackmun, Circuit Justice). Every day the press is denied permission to publish amounts to a "flagrant, indefensible, and continuing violation of the First Amendment." *New York Times Co.* v. *United States, supra* at 715 (Black, J., concurring). In this case, the Respondents petitioned for an extraordinary remedy after their indictment. Although the West Virginia Court acted with admirable dispatch, significant time elapsed before a final order issued. Because the name had been published, the harsher effects of a prior restraint were not in issue. Had the Respondents withheld publication pending permission from the lower court and had it been necessary to appeal a refusal, the news story would have been delayed by several months, even if the court had acted with equal speed.[4]

The distinction between this Court's "First Amendment 'Due Process'"[5] cases and the case at bar lies in the judicial administration of the prior restraint. However, a prior restraint is just as pernicious in the hands of a judge, who might well not enjoy the insulation from the political

[4]The West Virginia Court issued a rule in prohibition several weeks before its judgment. Preliminary injunctive relief would not have been possible to it if it were reviewing the denial of authorization to publish, because such preliminary relief would have cleared the way for the publication of the name the juvenile, the very damage that the statute seeks to avert.

[5]Monaghan, First Amendment "Due Process", *supra*.

process that Article III provides for federal judges, as in those of an executive official. *Compare Nebraska Press Ass'n* v. *Stuart, supra, and New York Times Co.* v. *United States, supra, with Southeastern Promotions, Ltd.* v. *Conrad, supra, and Lovell* v. *City of Griffin, supra.* With a fundamental First Amendment right at stake, this Court should not be parsimonious with procedural protections, which as Justice Frankfurter recognized, are inseparable from the history of American freedom. *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (separate opinion).

CONCLUSION

WHEREFORE, in view of the above, *amici* respectfully request that this Court affirm the judgment of the West Virginia Supreme Court of Appeals, thereby vindicating the right of the press and the public to receive and publish information on governmental affairs and matters of concern to the public, information necessary to the survival of democratic government.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
DAVID M. RICKLESS

1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

January 25, 1979

Of Counsel:

J. LAURENT SCHARFF, ESQUIRE
PIERSON, BALL & DOWD
1000 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
Attorney for Radio Television News Directors Association

ERWIN G. KRASNOW, ESQUIRE
1771 N Street, N.W.
Washington, D.C. 20036
Attorney for National Association of Broadcasters

W. TERRY MAGUIRE, ESQUIRE
1627 K Street, N.W.
Suite 400
Washington, D.C. 20006
Attorney for National Newspaper Association, West Virginia Press Association, Illinois Press Association, and Clarksburg Publishing Company

JACK LANDAU, ESQUIRE
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorney for Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

I, Richard M. Schmidt, Jr., a member of the Bar of the United States Supreme Court, hereby certify that three true copies of the Motion of American Society of Newspaper Editors; Radio Television News Directors Association; National Newspaper Association; National Association of Broadcasters; The Society of Professional Journalists, Sigma Delta Chi; Reporters Committee for Freedom of the Press; National Press Club; Associated Press Managing Editors; West Virginia Press Association; Illinois Press Association; and Clarksburg Publishing Company for Leave to File Brief, *Amici Curiae*, in Support of Affirmance, and Brief *Amici Curiae* were served pursuant to Supreme Court Rule 33(1) by mailing the same through the United States Postal Service, first class postage prepaid, on this 25th day of January 1979, upon the following:

F. Paul Chambers
Michael A. Albert
W. Henry Jernigan, Jr.
Jackson, Kelley, Holt & O'Farrell
1500 One Valley Square
Charleston, West Virginia 25322
Attorneys for Respondent Daily Mail Publishing Company

Rudolph L. DiTrapano
DiTrapano, Mitchell, Lawson & Field
604 West Virginia Street East
Charleston, West Virginia 25301
Attorney for Respondent Daily Gazette Company

Chauncey H. Browning
Cletus B. Hanley
Betty L. Caplan
State Capitol, Room E-26
Charleston, West Virginia 25305
Attorneys for Petitioners

MOTION FILED
JAN 26 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

MOTION OF CHICAGO TRIBUNE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

DON H. REUBEN
LAWRENCE GUNNELS
JAMES A. KLENK
11 South LaSalle Street
Suite 2001
Chicago, Illinois 60603
(312) 558-5500
Attorneys for Chicago Tribune Company

of Counsel:
REUBEN & PROCTOR
11 South LaSalle Street
Suite 2001
Chicago, Illinois 60603

INDEX

	PAGE
Motion of The Chicago Tribune Company for Leave to File Brief as Amicus Curiae	A1
Brief for Chicago Tribune Company as Amicus Curiae...	1
Argument	1
I. Publication of the Names of Juveniles is Rare.	2
II. Publication of the Names of Juveniles Who Commit Serious, Violent Crime Does Not Jeopardize Rehabilitation	4
Conclusion	6

CITATIONS

Cases.

Brian W. v. *Superior Court*, 20 Cal. 618, 143 Cal. Rptr. 717, 574 P.2d 788 (1978)	3
Cox Broadcasting Corporation v. *Cohn*, 429 U.S. 469 (1975)	2
In re R.L.K. Jr. v. *Minnesota*, 269 N.W.2d 367 (Minn. 1978)	3
Grosjean v. *American Press Co.*, 297 U.S. 233 (1936)	6
Keene Publishing v. *Keene District Court*, 3 Med. L. Rptr. 1595 (New Hamp. S.C. 1977)	3
Landmark Communications, Inc. v. *Commonwealth of Virginia*, 435 U.S. 829 (1978)	2
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	5
New York v. *Green*, 4 Med. L. Rptr. 1561 (N.Y. Sup. Ct. 1978)	2
Oklahoma Publishing Company v. *District Court of Oklahoma County*, 430 U.S. 308 (1977)	2

Statutes.

West Virginia Code 49-7-3	1-2

Miscellaneous.

Friendly & Goldfarb, *Crime & Publicity* 58 (1967) 3, 4

Geis, *Publication of the Names of Juvenile Felons,* 23 Mont. L. Rev. 141 (1962) 3

LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?* 51 A.B.A.J. 942 (1965) 5

Manella, *The Hard-Core Juvenile Offender,* National Council of Juvenile Court Judges Monograph (1977). 4

Silberman, *Criminal Violence, Criminal Justice* 49 (1978) 2, 4

Statement of National Council of Juvenile Court Judges, *reprinted in* Standard Juvenile Court Act, Comment § 33 (NPPA 1959) 3

Trojonowicz, *Juvenile Delinquency Concepts and Control* 27 (1978) 2

Wolfgang, Figlio & Sellin, *Delinquency in a Birth Cohort* 65-105 (1972) 4

"The Youth Crime Plague", Time 18-19 (July 11, 1977) 2

Sen. Rep. No. 93-1011, 93rd Cong. 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Ad. News 5283 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

MOTION OF THE CHICAGO TRIBUNE COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chicago Tribune Company respectfully requests leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for respondents has been obtained. The consent of the attorney for the petitioner was sought but refused.

The Chicago Tribune Company publishes the *Chicago Tribune*, one of the nation's largest metropolitan daily and Sunday newspapers. The *Chicago Tribune* is published in

Chicago, Illinois. Although the vast bulk of the *Chicago Tribune's* circulation is within the State of Illinois, it has circulation in West Virginia and every other state in the union.

The *Chicago Tribune* is deeply and vitally committed to the preservation and advancement of First Amendment freedom of the press. In support of this long-standing commitment, the *Chicago Tribune* and its parent-owner, The Tribune Company, have a well established practice of appearing, on a selective basis, in litigation that substantially affects the news media. See *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

The *Chicago Tribune* publishes news accounts of crimes that occur in metropolitan Chicago and across the nation. The *Chicago Tribune* infrequently publishes the names of juvenile criminals, but does believe it is proper, and upon occasion it does in fact do so, in cases of serious, violent crime. The policy of the newspaper is to refrain from publishing the names of youth offenders in connection with "status" and other minor offenses of juvenile delinquency. Because a state seeks license to impose criminal sanctions on two newspapers for the publication of a juvenile murderer's name in this case, the *Chicago Tribune* has a vital interest in this Court's decision.

The attached brief *amicus curiae* concentrates on the true incidence of juvenile name publication and the impact of such publicity on the juvenile and the community. Rather than present argument from judicial precedents, the brief argues from practical reality and common sense principles. Petitioner's Brief neither examines the frequency of delinquency name publicity nor analyzes its effects, and we expect the Respondents' Brief will focus on the substantial First Amendment and Equal Protection precedents that support the judgment below.

Accordingly, we believe that the *Tribune's* brief will provide an additional and practical insight and assist the Court's resolution of the case.

Respectfully submitted,

DON H. REUBEN

LAWRENCE GUNNELS

JAMES A. KLENK
11 South LaSalle Street
Suite 2001
Chicago, Illinois 60603
(312) 558-5500
Attorneys for Chicago Tribune Company

of Counsel:
REUBEN & PROCTOR
11 South LaSalle Street
Suite 2001
Chicago, Illinois 60603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

vs.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

BRIEF FOR CHICAGO TRIBUNE COMPANY AS AMICUS CURIAE

May It Please the Court:

The Chicago Tribune Company respectfully submits this brief as *amicus curiae*. The interest of the Chicago Tribune Company as *amicus* is fully presented in the motion for leave to file this brief bound herewith.

ARGUMENT

A unanimous West Virginia Supreme Court and Respondents have cogently demonstrated the First Amendment infirmity of West Virginia's newspaper juvenile-name ban, West

Virginia Code 49-7-3. *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 435 U.S. 829 (1978); *Oklahoma Publishing Company* v. *District Court of Oklahoma County*, 430 U.S. 308 (1977); and *Cox Broadcasting Corporation* v. *Cohn*, 429 U.S. 469 (1975). We will not duplicate that discussion.

We shall examine the true incidence of delinquent name reports and the impact of publicity on juveniles and the community. Like the controversy over publicity and fair trials, we believe that the claimed conflict between press freedom and juvenile rehabilitation is rare, if extant at all. In any case the West Virginia statute furthers no interest in juvenile redemption, and there is no cause to muzzle the press, especially under the threat of criminal sanction.

I.

PUBLICATION OF THE NAMES OF JUVENILES IS RARE

Juvenile crime today is on a sharp up-surge and is a subject of ever-increasing public concern and scrutiny. Today, 40 percent of all serious, violent crime is committed by persons seventeen years of age or younger.[1] Silberman, *Criminal Violence, Criminal Justice* 49 (1978). This represents over a 175 percent increase in serious juvenile crime since 1960. Trojonowicz, *Juvenile Delinquency Concepts and Control* 27 (1978). The public has responded, re-evaluating the juvenile justice system and, in many cases, lowering the age of majority for adult criminal sanctions. *New York* v. *Green*, 4 Med. L. Rptr. 1561 (N.Y. Sup. Ct. 1978). *See* "The Youth Crime Plague", *Time* 18-19 (July 11, 1977). In short, the juvenile justice system more than ever before is news—important news.

[1] We use the shorthand reference "serious, violent crime" in this brief to refer to the seven crimes of the FBI's Crime Index. These crimes are murder, aggravated assault, robbery, rape, burglary, larceny-theft, and auto theft.

Believing that publication of the minor misdeeds of youth serves no useful purpose, the *Chicago Tribune* refrains from publishing juvenile identities in all but the most serious crimes. Murder, rape, and robbery are the crimes that terrorize society, and these are precisely the kinds of cases that should receive full public airing if the nation is ever to understand the root causes of the juvenile crime wave. Far from frustrating the process, that inquiry exposes the weaknesses of society's response to this ever-increasing problem.

Historically, the media have treated the juvenile offender with extreme sensitivity. Statement of National Council of Juvenile Court Judges, *reprinted in* Standard Juvenile Court Act, Comment § 33 (NPPA 1959). In many instances, the press has voluntarily withheld the names of accused juveniles. *See, e.g., In re R.L.K. Jr.* v. *Minnesota*, 269 N.W.2d 367 (Minn. 1978); *Brian W.* v. *Superior Court*, 20 Cal. 618, 143 Cal. Rptr. 717, 574 P. 2d 788 (1978); *Keene Publishing* v. *Keene District Court*, 3 Med. L. Rptr. 1595 (New Hamp. S.C. 1977). Only the chronic offender or the local *cause celebre*, like the senseless high school slaying here, has drawn the media's critical evaluation and prompted public controversy. Geis, *Publication of the Names of Juvenile Felons*, 23 *Mont. L. Rev.* 141, 145 (1962).

The publication of juvenile identities in fact is rare. Judge Skelly Wright estimates that less than one percent of the hundreds of thousands of crimes committed each year receive any mention at all in the press. Friendly & Goldfarb, *Crime & Publicity* 58 (1967). Given the special concern the press has historically manifested toward the juvenile, we suspect that the true incidence of juvenile crime reporting is even far less than the Wright estimate. Indeed, this is apparently the first prosecution under the West Virginia law since its adoption almost 40 years ago. The problem, if one exists at all, cannot be too great.

Accordingly, we think it unfortunate and unnecessary that the State of West Virginia has instituted this criminal prosecution and prompted this confrontation.

II.

PUBLICATION OF THE NAMES OF JUVENILES WHO COMMIT SERIOUS, VIOLENT CRIME DOES NOT JEOPARDIZE REHABILITATION

Seldom has there been a case where a State has offered so little to abridge a newspaper's freedom to publish. The sole basis upon which petitioner asks this Court to sustain the West Virginia name-ban is the speculative hope that a newspaper's silence may somehow help a juvenile murderer to mend his ways. Common sense teaches that this is simply not true.

First. Newspapers publish stories about serious, violent crime. Friendly & Goldfarb, *Crime & Publicity* 59-64 (1967). Over 90 percent of the serious, violent crimes committed by juveniles are committed by multiple-offenders. Wolfgang, Figlio & Sellin, *Delinquency in a Birth Cohort* 65-105 (1972). These hard core delinquents typically have long histories of criminal, deviant behavior, hold deeply-rooted, anti-social values, and are hostile, alienated personalities. Publication of their names poses no real threat to their redemption. Manella, *The Hard-Core Juvenile Offender*, National Council of Juvenile Court Judges Monograph (1977).

The juvenile offender who has an occasional brush with the law does not commit serious, violent crimes. His wrong is typically a "status offense" of passing consequence (such as truancy). Silberman, *Criminal Violence, Criminal Justice* 49-50 (1978). As a practical matter, his name will not find its way into the media.

Second. Publicity has little, if any, impact upon the serious, violent juvenile offender. The immediate impact of a news report is lost in the trauma of the crime and the juvenile's

confrontation with the State. The criminal act, the arrest, the lock-up, and the ordeal of the urban juvenile court are stark, overwhelming life events. The juvenile's psychological and emotional realization of his plight is numbing. Any finding of delinquency is made by the State, and if such labels frustrate rehabilitation over time, it is the State, and not the media, that is responsible. *See* Sen. Rep. No. 93-1011 93rd Cong. 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Ad. News 5283, 5288.

Third. The impact of publicity upon the community is similarly negligible at best. In truth, the juvenile offender here lost his anonymity the moment he shot and killed his fellow student at school. The high school, his parents, and his peers soon heard of the crime, and word of the deed raced over the grapevine. As this Court has recognized, "a whole community cannot be restrained from discussing a subject intimately affecting life within it." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 567 (1976).

Over time the impact of the publicity rapidly dissipates. People just do not remember the news from one day to the next. LeWine, *What Constitutes Prejudicial Publicity in Pending Cases*? 51 A.B.A.J. 942, 945 (1965). Thus, to argue that newspaper identification of the juvenile today impacts upon the community's treatment of the juvenile ten years from now strains credulity.

These three general principles apply with special force to the peculiar facts of this case. *Before* respondents had even published the juvenile's identity, local radio stations—which are not subject to the name-ban—had identified the offender on the air. The State simply cannot expect that the publication of a juvenile's name will jeopardize his rehabilitation when it permits the broadcast media to trumpet his name at will and magazines to memorialize his name and crime in print.[2]

---

[2] The West Virginia statute is a textbook denial of Equal Protection. Only newspapers are subject to criminal penalty; radio

(footnote continued on next page)

In summary, we seriously question the notion that the publication of the name of a serious, violent juvenile offender interferes with his rehabilitation. While we hold similar doubts about the impact of publicity on the occasional delinquent, such cases seldom arise. We are confident that when and if such publications might arguably threaten the futures of youth offenders, a responsible dialogue between the media and juvenile authorities can and will accommodate the interests involved. Prior restraint is not the answer.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the West Virginia Supreme Court should be affirmed.

Respectfully submitted,

DON H. REUBEN
LAWRENCE GUNNELS
JAMES A. KLENK

Attorneys for Chicago Tribune Company

of Counsel:
REUBEN & PROCTOR
11 South LaSalle Street
Suite 2001
Chicago, Illinois 60603

(312) 558-5500

---

and television broadcasters and other print media suffer no exposure. While the Court could summarily affirm on this basis, we urge the Court to affirm the judgment on First Amendment grounds. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 251 (1936). Any other result, we fear, may cast doubt upon the West Virginia holding and unintentionally encourage bogus pleas for the suppression of public records, burdening the courts as well as the press with costly, needless litigation.

MOTION FILED
JAN 29 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, *et al.*,
Petitioners,

—v.—

STATE *ex rel.* DAILY MAIL PUBLISHING CO., *et al.*,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, *et al.*,
Petitioners,

—v.—

DON MARSH, *et al.*, THE DAILY GAZETTE CO., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE, AND BRIEF *AMICUS CURIAE*

BRUCE J. ENNIS
CHARLES S. SIMS
GEORGE KANNAR
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016
Attorneys for Amicus Curiae

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, et al.,

Petitioners,

-v.-

STATE EX REL. DAILY MAIL PUBLISHING CO., et al.,

Respondents,

THE HON. ROBERT K. SMITH, JUDGE, et al.,

Petitioners,

-v.-

DON MARSH, et al., THE DAILY GAZETTE CO., et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

Motion of the American Civil Liberties Union For Leave To File Brief Amicus Curiae

---

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Although Respondents consented to the filing of a

brief amicus curiae by the Juvenile Defender Attorney Program urging reversal of the judgment below, Petitioners have refused to consent to the filing of this brief, which urges that the judgment below be affirmed. Respondents' consent has been filed.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members. The ACLU is dedicated solely to defending the principles of the Bill of Rights. Central among those principles is the First Amendment's freedom of the press, a prerequisite to the continued maintenance of a free society. Equally important is the citizen's right to be free from unwarranted intrusions on personal privacy. The parties to this case contend that these important constitutional principles are in irreconcilable conflict here.

In previous cases the ACLU has represented before this Court both sets of interests now contending for recognition. In numerous cases, the ACLU has argued that the press must be free to print whatever information it wishes without prior restraint or fear of subsequent criminal punishment. In other cases, it has supported the right to be free from unwarranted

intrusions on the right of privacy.

In this case, restrictions on the freedom of the press are sought to be justified in the name of protecting personal privacy. But restrictions on speech and expression are impermissible methods of achieving even laudable societal goals. Although it may be desirable to keep the names of juvenile offenders out of the public press, and although it may be permissible for the state to attempt to keep secret the names of juvenile offenders, it does not follow that the state may impose criminal sanctions on a newspaper or reporter for the act of publishing those names once they have been lawfully obtained. Our constitutional system -- which includes both freedom of the press and personal privacy -- is better served by the free flow of truthful, lawfully obtained information than by its suppression, even if the dissemination of that information sometimes impedes the full implementation of desirable social policies.

It is to present this analysis that amicus respectfully moves for leave to

file this brief.

Respectfully submitted,

BRUCE J. ENNIS
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorney for Amicus Curiae

January 25, 1979

In The
SUPREME COURT OF THE UNITED STATES
October Term 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, et al.,
Petitioners,

-v.-

STATE EX REL. DAILY MAIL PUBLISHING CO., et al.,
Respondents,

THE HON. ROBERT K. SMITH, JUDGE, et al.,
Petitioners,

-v.-

DON MARSH, et al., THE DAILY GAZETTE CO., et al.,
Respondents

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

TABLE OF CONTENTS

	Page
Table of Authorities	ii
INTEREST OF AMICUS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
THE ABSOLUTE PROHIBITION OF PUBLICATION OF THE NAMES OF JUVENILE DEFENDANTS WITHOUT AN ORDER OF THE COURT ABRIDGES THE FREEDOM OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT.	
A. The Challenged Statute Strikes Directly At The Core Of The First Amendment Guarantee Of Freedom Of The Press.	6
B. No Compelling State Interest Justifying The Challenged Statute Has Been Shown.	12
C. Previous Decisions Of This Court Require Affirmance Of The Judgment Below.	20
CONCLUSION	28

Table of Authorities

Cases:

Abrams v. United States, 250 U.S. 616 (1919) 6

Brandenburg v. Ohio, 395 U.S. 444 (1969). 6

Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975).... 7, 10, 17, 20, 22, 23, 26, 27

Gannett Co. v. DePasquale, 43 N.Y.2d 37, cert. granted, 435 U.S. 1006 (1978).. 11

In re Gault, 387 U.S. 1 (1967) 12

Grosjean v. American Press Co., 297 U.S. 233 (1936) 7

Houchins v. KQED, ___ U.S. ___, 57 L.Ed.2d 553 (1978) 26-27

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)...13, 22, 25, 26, 27

Nelvin v. Reid, 112 Cal.App. 285, 297 P.91 (1931) 15

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 10

Miller v. California, 413 U.S. 15 (1973) 6

Near v. Minnesota, 283 U.S. 697 (1931)...11

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 23

New York Times v. Sullivan, 376 U.S. 254 (1964) 6, 7

New York Times v. United States, 403 U.S. 713 (1971) 11

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) 10, 19, 23, 24

Procunier v. Martinez, 416 U.S. 396 (1974) 16

State ex rel. Daily Mail Publishing Co. v. Smith, 248 S.E.2d 269 (W.Va. 1978)..... 13, 14

Whitney v. California, 274 U.S. 357 (1927) 7

In re Winship, 397 U.S. 358 (1970).. 12, 27

United States Constitution:

First Amendment .....passim

Statutes:

18 U.S.C. §5038(d)(2) 25, 26

W. Va. Code 49-5-17 ....17, 26

49-7-3 3

49-7-20 3

Other Authorities:

S.Rept. No. 93-1011, 3 U.S. Code Cong. & Admin. News 5283 (July 16, 1974) 26

Litwack, The Doctrine of Prior Restraint, 12 Harv. C.R.-C.L. L. Rev. 517 11

Tribe, American Constitutional Law, (1978) 13-14, 21

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, et al.,

Petitioners,

-v.-

STATE EX REL. DAILY MAIL PUBLISHING CO., et al.,

Respondents,

THE HON. ROBERT K. SMITH, JUDGE, et al.,

Petitioners,

-v.-

DON MARSH, et al., THE DAILY GAZETTE CO., et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS

The interest of amicus appears in the foregoing motion.

STATEMENT OF THE CASE

The February 10, 1978 edition of respondent Charleston Daily Gazette reported that the previous morning a 15 year-old ninth-grader had been shot and killed by a 14 year-old fellow-student in the corridor of a junior high school in nearby St. Albans, West Virginia. The front-page story was accompanied by a photograph of the alleged killer in police custody, and both the story and the caption to the photograph identified him as Stewart Wayne Perrock. That afternoon, respondent Charleston Daily Mail, whose edition the previous day had reported the shooting without identifying Perrock, ran a follow-up article giving additional details about the shooting, including Perrock's name.

As is commonly the case with news stories, the contents of the articles in that Friday's editions of the Gazette and the Mail, including Perrock's name, were not exactly news to many of their readers.

For one thing, there were several eyewitnesses to the shooting, and the names of the dead boy and his alleged killer were common knowledge in the school and the community it served within hours after the incident. In addition to word-of-mouth, more modern competitors of the newspapers had also been at work. At least three local radio stations had broadcast the facts of the shooting, including Perrock's name, throughout the Charleston area by the time Friday's papers were published.

The Gazette, the Mail, and several editors and reporters of the two newspapers were subsequently indicted for violation of West Virginia Code 49-7-3, which prohibits the publication "in any newspaper" of the name of any juvenile in connection with any juvenile proceeding without an order of the court. If found guilty, respondents could each be jailed for as much as six months, and fined up to $100. W. Va. Code 49-7-20.

Respondents sought a writ of prohibition in the West Virginia Supreme Court of Appeals against further proceedings under that indictment, and the writ was granted. The Supreme Court of Appeals unanimously

held that,

> to the extent that W.Va. Code, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the W.Va. Code it is repugnant to the First Amendment of the Constitution of the United States as a prior restraint on the freedom of the press.

State ex rel. Daily Mail Publishing Co. v. Smith, 248 S.E.2d 269, 272 (W.Va. 1978). Certiorari was sought, and granted by this Court on November 13, 1978.

SUMMARY OF ARGUMENT

The question for decision is not whether the public's interest in knowing the name of a juvenile defendant outweighs the harm which may result from revealing it. There are many situations -- and this may well be one -- in which the prudent newspaper editor would conclude that it is better not to publish. But the First Amendment does not protect only the prudent. Rather, it guarantees that in all but the most compelling circumstances each editor has the right to decide whether particular information in his possession should be published, at least where the information

is lawfully acquired.

The information at issue here was neither obscene nor untruthful. It concerned a matter of public importance. It was not secret. It was acquired by lawful means. It is precisely the sort of information to which First Amendment values most clearly attach. (Point A). No compelling exigency justifies its suppression. (Point B). This Court's prior rulings require that the judgment below be affirmed. (Point C).

ARGUMENT

THE ABSOLUTE PROHIBITION OF PUBLICATION OF THE NAMES OF JUVENILE DEFENDANTS WITHOUT AN ORDER OF THE COURT ABRIDGES THE FREEDOM OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT.

The question raised by this case is an important one, but the principles at issue are by no means novel. The State of West Virginia has criminally prosecuted two Charleston newspapers for publishing the name of a juvenile defendant charged with shooting a fellow junior high school student to death. Thus, this case involves an attempt by a state to prohibit the

publication of particular content, on pain of criminal sanctions. This Court has dealt with such attempts before. What is novel in this case is that the matter the state is attempting to censor is not obscenity, cf. Miller v. California, 413 U.S. 15 (1973), or intentionally or recklessly false defamatory statements, cf. New York Times v. Sullivan, 376 U.S. 254 (1964), or direct incitements to violence, cf. Brandenburg v. Ohio, 395 U.S. 444 (1969), but true reports of events of public interest -- indeed, events that are the subject of judicial proceedings. The First Amendment does not permit such censorship.

A. The Challenged Statute Strikes Directly At The Core Of The First Amendment Guarantee Of Freedom Of The Press.

This Court needs no reminder of the importance of the constitutional guarantee of freedom of the press, for over the years this Court has been an eloquent defender of that freedom. It has repeatedly stressed the importance of free debate concerning ideas, opinions and values. See, e.g. Abrams v. United States, 250 U.S. 616,

630-31 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring). The Court has consistently emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan, supra, at 270.

But the Court has also repeatedly indicated that the informing function of the press is extremely important as well. See, e.g., Grosjean v. American Press Co., 297 U.S. 233 at 256 (1936). It means nothing to circulate provocative or novel ideas in a factual vacuum. The humble, prosaic job of reporting the facts the public needs to form opinions and judge new ideas is the indispensable predicate of a politically and intellectually "robust" debate. As the Court recently observed,

> Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

Precisely that interest is at stake here. As the Court said in Cox,

> "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."

Ibid. In particular, the increasing incidence of juvenile crime and the increasing public discontent with established procedures for prosecuting juvenile offenders have made juvenile justice a controversial subject. The facts of an especially shocking juvenile crime are surely relevant to the debate over the appropriate legislative and judicial response to such crime.[1/]

1/ Indeed, in connection with its report on the crime at issue here, the Gazette specifically called attention to the fact that under West Virginia law the boy suspected of killing his schoolmate could only be charged with juvenile delinquency and, if convicted, could only be sentenced to detention until reaching the age of 18. A companion editorial also criticized the statute challenged in this case. The importance of free debate on the propriety of such statutes is obvious, but so is the importance of providing information so that the public may judge that debate.

Petitioners object that certain information is too trivial to be of value in determining public issues. Specifically, they contend that the public need not know the name of the accused killer to form a judgment about the most appropriate procedures for judging the accusation. But whether one would personally make the editorial judgment to publish a defendant's name is beside the point: the First Amendment reserves that judgment for the press.[2/] It is not for the government to decide which facts concerning events of public interest are too unimportant to be printed. As the Chief Justice has written for the

2/ Moreover, it is by no means clear that no purpose is served by publishing the name of the accused in a criminal proceeding. Publication may bring forward witnesses with information about the defendant that may be highly relevant to the particular case, or to a public debate about such cases generally. For example, a witness may have seen the accused at the time of the crime either near or far from the scene, or may be able to dispute newspaper accounts claiming that the defendant's character or history are in some way typical of those accused of crime.

Court:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials -- whether fair or unfair -- constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

This Court has wisely refrained from attempting to assess for itself whether the name and picture of a juvenile defendant or the name of a rape victim was of too little importance to be worthy of First Amendment protection. Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting, supra. The Constitution does not protect the press only when it reports information that a court decides it is well for the public to know. Rather, it protects the autonomy of every newspaper to present to the public the information that its editors decide is worthy of

publication.[3]

This case does not involve a claim by the press that the right to speak implies a right of access to information the state prefers to keep secret. Cf. Gannett Co. v. DePasquale, 43 N.Y.2d 37, cert. granted, 435 U.S. 1006 (1978). Rather, it involves a state's attempt to prohibit the accurate publication of factual information directly relevant to important issues in the administration of criminal law which the press already has. The right to publish such information lies not at the periphery, but rather at the core, of First Amendment freedoms. This Court has never upheld an attempt by federal or state governments to punish the exercise of editorial discretion

---

3/ For this reason, the fact that the statute permits judges to authorize publication of juvenile defendants' names cannot save it, as petitioners contend. Petitioners' Br. at 10, 16-17. Requirements that newspapers submit proposed copy to a judge for pre-publication approval are, if anything, even more alien to the First Amendment than subsequent punishments. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931); New York Times v. United States, 403 U.S. 713 (1971). See generally Litwack, The Doctrine of Prior Restraint, 12 Harv. C.R.-C.L. L. Rev. 519 (1977).

to report truthfully information known to the press.

B. No Compelling State Interest Justifying The Challenged Statute Has Been Shown.

Even assuming that some urgent necessity can justify an infringement on interests that lie at the very heart of the First Amendment, no such compelling interest has been shown in this case.

The most significant state interest alleged in support of the challenged statute is an interest in preserving the confidentiality of juvenile court proceedings. The permissibility of such confidentiality, it is argued, has already been upheld by this Court. In re Winship, 397 U.S. 358, 366 (1970); In re Gault, 387 U.S. 1, 25 (1967). But the confidentiality of juvenile court proceedings and records is not at issue: respondents do not challenge the power of the state to maintain the confidentiality of such proceedings and records by denying the press and the public free access to them. Nor does this case involve the state's power to punish participants in such proceedings or someone who "secures

[such] information by illegal means. . . ." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).

What respondents challenge is the state's power to punish a newspaper for divulging truthful information obtained through its own legitimate investigations, and not by surreptitious or illegal means, concerning an event of public interest which occurred in a public place, and not a closed courtroom. To justify such a prohibition, the state must show a compelling interest in preventing some harm that would flow not from the disclosure of confidential information, but from the printing in a newspaper of information already widely disseminated in the community.

Two such state interests are advanced. First, it is argued that the state has an interest in protecting the juvenile defendant's privacy interest in "anonymity with regard to his youthful transgressions." State ex rel. Daily Mail Publishing Co. v. Smith, supra, 248 S.E.2d at 271. For purposes of this case, we need not dispute that an individual's right to a measure of personal privacy, which itself has constitutional dimensions, see Tribe, American

Constitutional Law 648-650 (1978), may sometimes justify limitations on publication. As this Court has noted,

> powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.

Cox Broadcasting, supra, 420 U.S. at 487 (emphasis in original).

But however such a zone of privacy may be defined, it can surely have no relevance to a case such as this. While there may be "intimate facts about one's personal identity," Tribe, supra, at 649, over which the state may have a compelling interest in guaranteeing an individual's control, no such private facts were revealed here. To be sure, a criminal defendant, of whatever age, would prefer not to have others know that he stands accused. But we may not equate the embarrassing with the private. The act which the juvenile defendant here was accused of committing was terribly, tragically public.[4/] No con-

4/ Perhaps it can be argued that even such an incident, with the passage of time, becomes a purely private matter, and that the press may be prohibited from dredging (continued on next page)

stitutional right of privacy attaches to justify suppressing a full account of such an event, regardless of the age of the accused.

The second interest advanced by the state is an interest in the rehabilitation of juvenile offenders. The state argues that publication of the name of a juvenile defendant irrevocably taints the reputation at an early age, and so labels the defendant that future efforts to reform or rehabilitate - objects of particular concern with young offenders - will be seriously hampered. The rehabilitation of offenders - whether juvenile or adult - is surely an important governmental interest. But it is not compelling enough to justify infringing the First Amendment rights of the press and the public at large to discuss information in the public domain. The state's interest in furthering its correctional policies is not even a talismanic justification for all limitations on the First Amendment rights of prisoners themselves.

up, years later, the forgotten fact that a now-rehabilitated member of the community had once had a brush with the law. Cf. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). But the same argument cannot be made with respect to a c-ntemporaneous account of an individual's role in an event of public significance.

Procunier v. Martinez, 416 U.S. 396 (1974). The argument that it justifies abrogating the rights of those who have committed no crime is novel indeed.

Even assuming the state's professed goal is sufficiently weighty, however, the relation of the regulation to that interest is at best tangential. Two ways in which the state's policy of rehabilitating juvenile offenders may be undermined by publication of the names of juvenile defendants have been advanced. First, it is argued, the state's policy of encouraging the return of such offenders to normal society by preventing public dissemination of arrest and conviction records is undermined if the information contained in such records has been published. Second, it is argued that the psychological damage done to young defendants by the stigma resulting from publication of their names will prevent their rehabilitation.

Neither argument is persuasive. The publication in a local newspaper of a defendant's name is in no way comparable to the maintenance of an official arrest record, which can be, and regularly is,

widely disseminated to law enforcement agencies or employers. Public memory of such events and names quickly fades, and neither employers nor police agencies are likely to review all the back issues of every newspaper in the country for information about possible juvenile offenses in the routine way in which they might check for an arrest record. The suppression of such official records, as authorized by W.Va. Code 49-5-17, serves an important purpose in reintegrating former offenders into society and shielding them from prejudice. But it is not necessary to that purpose to try to suppress all memory of such incidents by infringing the First Amendment rights of the public and press.

Even more speculative is the argument that such publication inflicts irremediable psychological damage on the young defendant. It cannot be pleasant to read that one is accused of a terrible crime. But that experience is almost insignificant in comparison with the ordeal through which a juvenile defendant must pass in any event. The trauma suffered by a 14-year-old boy who has seen a schoolmate dying in a corridor from gunshots he himself is alleged to have inflicted; suffered the accusation of witnesses; been hunted down by the

police; been booked and confined as a criminal defendant; and read newspaper accounts of the crime with which he is charged, will not be significantly worsened if the boy also sees his name in the newspaper. Nor is it credible that such a defendant will be more scarred by the knowledge that utter strangers have read newspaper stories naming him than by the knowledge that everyone of importance to him has undoubtedly heard of the charges against him. The speculative and dubious nature of these assertions is underlined by the fact that neither the state nor amicus Juvenile Defender Program cites even a shred of evidence to support them.[5/] To argue that preventing the marginal ill effects of this kind of publicity is

---

5/ The problem of "labeling" noted in the testimony cited by amicus clearly refers, when taken in context, to the official labeling imposed by a regular judgment of conviction. The argument that being labeled a "juvenile defendant" is less traumatizing than being labeled a "criminal" is dubious enough in any case; euphemisms are not so powerful. But the cited testimony itself demonstrates that the key elements in the process referred to are official labeling, imposition of sanctions, and internalization of official critical stances - all of which were abundantly present, regardless of newspaper publication, in the proceedings to which the juvenile defendant here was subjected.

essential to achieving the governmental purpose of rehabilitating youthful offenders is absurd.

In any event, West Virginia itself has not acted as if the prevention of such harms were of compelling importance. Like the court in Oklahoma Publishing, which sought to prevent publication of information it had itself already made part of the public record, West Virginia has not attempted to prohibit all public dissemination of the names of juvenile defendants, but only that which takes the form of publication in newspapers. The many witnesses to the crime are not forbidden from talking about it on a soapbox on the street. Even more remarkably, radio and television stations, the primary source of information for most citizens, are not forbidden to broadcast the same information respondents have been indicted for publishing. The state cannot sensibly argue that information it permits to be broadly disseminated to the public over the air waves is so potentially damaging that it must be suppressed when it appears in print.[6/]

6/ The state's attempt to regulate the print media, without similarly regulating the broadcast media, raises serious questions of equal protection as well.

It is not enough to justify infringement of a First Amendment right that the infringement is vaguely related to a state policy of rehabilitating juvenile offenders. Where the contribution of suppression of speech to such a policy is as speculative and marginal as it is here, a compelling state interest has not been shown.

C. Previous Decisions of This Court Require Affirmance of the Judgment Below.

This Court has dealt with state attempts to suppress publication of information about judicial proceedings in several recent cases. The results and the reasoning of those decisions support the judgment below.

In the first of this series of cases, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court was faced with a private tort suit for invasion of privacy based on a Georgia statute making it a misdemeanor to broadcast the name of a rape victim. The Court held that the state may not, consistently with the First Amendment, "impose sanctions on the accurate publication of the name of a rape victim obtained from public records." 420 U.S. at 491.

Cox Broadcasting differs from this case in several respects, all of which would

seem to make it a stronger case than the present one for imposing some limitation on the prerogatives of the press. First, the facts revealed by the radio station in that case would generally be regarded as of a much more intimate nature than those involved here. The special horror of rape is its intrusion on the victim's personal privacy and autonomy, and public revelation compounds that intrusion. An accusation of crime is entirely different with regard both to the nature of the information disclosed and the concerned individual's relationship to it. The juvenile defendant here is accused of committing a highly public act, not of being the victim of an intimate one.

Second, in a private action for invasion of privacy, the personal interest of the plaintiff in "control[ling] what others are told about his or her life" is directly implicated. See Tribe, supra, at 649. Here, that interest is weak, and the state seeks not to compensate an individual for an invasion of privacy committed by another private party, but to bolster through criminal punishment its own less pressing interest in the rehabilitation of offenders. Thus, the state's interest here would seem to be weaker than

in Cox Broadcasting, while the First Amendment interests of the press and public in information concerning "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions" would seem to be at least as great. 420 U.S. at 492.

Petitioners suggest only one distinction between this case and Cox Broadcasting. In that case, they argue, the information revealed was contained in a public record, and this fact accounts for the privilege of the press to report it; here, the information was derived not from open court records, but from reporters' independent investigations.

This distinction is spurious. Had the information at issue in Cox Broadcasting been obtained by illegal or surreptitious acquisition of confidential documents, the case might have been different. Cf. Landmark Communications, supra, 435 U.S. at 837. But while there may be a significant difference between a public record and a secret one where a state or individual interest in confidentiality is concerned, there can be no constitutional difference between what happens in a public courtroom and what happens on a public street. A state interest that may be sufficient to

justify attempts to keep information from the press is not automatically sufficient to justify limiting a reporter's right to publish what he sees with his own eyes, or is told by an eyewitness. Whatever may be the case with respect to the publication of confidential juvenile court records themselves, the fact that something a reporter sees or hears in a public place also happens to be contained in such a document does not justify a restraint on publication. 7/

The next case raising a similar issue was Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). In that case, the Court relied on Cox Broadcasting and Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), to hold that a state court could not constitutionally enjoin the press from publishing the name or photograph of a juvenile defendant where the court had permitted the press to attend

---

7/ The difference between what occurs in a closed official proceeding and what happens on a public street is hardly "fortuitous." Br. of amicus Juvenile Defender Program at 6. It is the difference between what is public and what is private, between limiting press access to the councils of government and directly prohibiting private citizens from speaking what they know.

a court hearing involving that defendant. Petitioners try to distinguish that decision by again pointing out that the state court had attempted to suppress matter presented in open court. Again, however, the significance of that fact is merely that the information in question was not "acquired. . . unlawfully." 430 U.S. at 311. What matters, in other words, is not that the information was revealed in court, but that it was revealed in the open. While this Court may have left open the possibility that publication of illegally-acquired information in which the government has a legitimate secrecy interest might be punished, it has never suggested that what a reporter learns through legitimate investigation may be suppressed. 8/

8/ Petitioners and amicus Juvenile Defender Program attempt to distinguish Oklahoma Publishing by arguing that in this case the juvenile's name was not revealed by "law enforcement officials," Br. of amicus at 6, "or gotten by lawful means." Petitioner's Br. at 11. The former distinction, as argued in the text, is irrelevant, and in any event inaccurate - for the record shows that respondent Gazette obtained the juvenile's name from a police officer. App. at 25. The latter contention is puzzling as well as inaccurate. There is nothing unlawful

(continued on next page)

The Court's decision just last Term in Landmark Communications, Inc. v. Virginia, supra, conclusively demonstrates that the freedom of the press to publish what it knows is not limited to what transpires in open court. In that case, as in this, the information in question had not been acquired in open court, and concerned a proceeding that state law required to be held on a confidential basis. Nevertheless, this Court held unanimously that the publication of the information could not be made a crime, despite important state interests in maintaining the confidentiality of the proceedings. 9/

---

about newspaper reporters' discussing a crime with eyewitnesses and other reporters (respondent Mail, App. at 4), or police officers (respondent Gazette, App. at 25), and nothing in the record contradicts respondents' affidavits stating that such discussions were the source of respondents' information.

9/ Lacking support in the decisions of this Court, petitioners and amicus Juvenile Defender Program attempt to take comfort in an Act of Congress, contending that 18 U.S.C. §5038(d)(2) is a precedent for the West Virginia statute. Petitioner's Br. at 14, Br. of amicus at 10-11. Of course, enactment of an identical federal statute could not redeem an unconsti-

(continued on next page)

Taken together Cox Broadcasting, Oklahoma Publishing, and Landmark Communications conclusively demonstrate that the press cannot be punished for publishing information it has acquired legally simply because the government might have an interest in keeping that information secret. There may be some circumstances under which the state will be found to have an interest sufficient to justify denying the press and public access to information in its possession. See, e.g.,

tutional state statute. But §5038(d)(2) is not analogous to the challenged statute in any event. Rather than specifically singling out the press for special criminal penalties, the federal statute creates no criminal liability, and apparently does not apply to the press at all. While the provision states in general terms that the name and picture of a juvenile "shall [not] be made public by any medium of public information in connection with a juvenile delinquency proceeding," the context - a series of limitations on the maintenance and use of juvenile court records by government personnel - makes clear that the prohibition is directed at courts, prosecutors, and police. The legislative history confirms that the clause is to be read as similar in nature to those that precede it; no indication is given of an unprecedented attempt to restrain the press. See S. Rept. No. 93-1011, 3 U.S. Code Cong. and Admin. News 5283, 5321-22 (July 16, 1974).

Houchins v. KQED, ___ U.S. ___, 57 L.Ed.2d 553 1978).[10/] But when the government does not control access to the information - whether because it has voluntarily made the information public, as in Cox Broadcasting or Oklahoma Publishing, or because private citizens came into its possession independently, as in Landmark Communications, or this case - the government has no power to suppress it. Any attempt to do so trenches directly on the core of the freedom of the press guaranteed by the First Amendment. It must be justified, if at all, only by a compelling state interest. As already demonstrated, no such interest is present in this case.

10/ The confidentiality of juvenile court proceedings approved by this Court in such cases as In re Winship, 397 U.S. 358, 366 (1970), on which petitioners rely, consists solely of such denial of access, as when juvenile proceedings are closed to the public, or juvenile court records are sealed.

CONCLUSION

The decision of the Supreme Court of Appeals of West Virginia should be affirmed.

Respectfully submitted,

BRUCE J. ENNIS
CHARLES S. SIMS
GEORGE KANNAR
c/o American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Dated: January 29, 1979

MOTION FILED
JAN 26 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amicus Curiae
American Newspaper Publishers
Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

---

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of Respondents,

urging affirmance of the decision of the Supreme Court of Appeals of West Virginia. Although the attorneys for Respondents have consented to ANPA's filing a brief amicus curiae, the Petitioners have withheld consent.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1324 newspapers representing more than 91 percent of the total daily and Sunday newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers eighteen members in the State of West Virginia.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system; namely, the dissemination of information which is of vital interest to the public.

In the case before this Court, the state of West Virginia has imposed a system of prior restraint aimed specifically at newspapers and only at newspapers. The statute in question requires newspapers to apply to a court for prior permission to publish constitutionally protected information in which the public has a legitimate interest. The statute in question is without any standards to guide the censoring authority and requires no assessment of its effectiveness prior to imposition of

a restraint on publication. Moreover, the statute unconstitutionally discriminates against newspapers in allowing broadcasters and other print media to publish the name of a juvenile involved in delinquency proceedings, while denying that same right to newspapers.

In view of the importance of the issues raised in this case ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant legal questions involved in this proceeding.

WHEREFORE, the American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit ANPA to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D.MCKEY
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae,
American Newspaper Publishers
Association

INDEX

	Page
PRELIMINARY STATEMENT	2
INTEREST OF THE AMICUS CURIAE	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Under the Decisional Authority Governing Application of the First Amendment to the United States Constitution, West Virginia Code 49-7-3 Constitutes an Impermissible Prior Restraint on Constitutionally Protected Speech	8
II. Where a Statutory Scheme Requiring Official Permission to Exercise First Amendment Rights is Unconstitutional for Lack of Standards, Such Statutory Scheme may be Ignored with Impunity	13
III. West Virginia Code 49-7-3 is Constitutionally Deficient in Failing to Require, Prior to its Application, a Showing of its Probable Effectiveness in Achieving The State Interest it is Designed to Serve	19
IV. West Virginia Code 49-7-3 Violates the Equal Protection Clause of the Fourteenth Amendment in Requiring that Only Newspapers Obtain a Court Order Prior to Publication	21
CONCLUSION	24

TABLE OF CITATIONS

CASES:	Page
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963)	9
Bates v. *Little Rock*, 361 U.S. 516 (1960)	10
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	16
CBS v. *Democratic National Committee*, 412 U.S. 94 (1973)	22
Chandler v. *Judicial Council*, 398 U.S. 74 (1970)	18
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942)	9
Chicago Police Department v. *Mosley*, 408 U.S. 92 (1972)	22
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	6
Craig v. *Harney*, 331 U.S. 367 (1947)	4, 10
Elrod v. *Burns*, 427 U.S. 347 (1976)	4
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	6
In re Gault, 387 U.S. 1 (1967)	11, 12
In re Winship, 397 U.S. 358 (1970)	11
Gitlow v. *New York*, 268 U.S. 652 (1925)	22
Government of Virgin Islands v. *Brodhurst*, 285 F. Supp. 831 (D.C. Virgin Islands, 1968)	8
Hague v. *C.I.O.*, 307 U.S. 496 (1938)	16
Houchins v. *KQED, Inc.*, ____U.S.____, 57 L.Ed 2d 553 (1978)	6
Inmates of Boys Training School v. *Affleck*, 346 F. Supp. 1354 (D.R.I. 1972)	11
Kovacs v. *Cooper*, 336 U.S. 77 (1949)	5, 23
Kunz v. *New York*, 340 U.S. 290 (1951)	15
Laird v. *Tatum*, 409 U.S. 824 (1972)	18

	Page
Landmark Communications Inc., v. *Virginia*, ____U.S.____, 56 L.Ed. 2d 1 (1978)	6, 13, 19
Lovell v. *Griffin*, 303 U.S. 444 (1938)	15
McKeiver v. *Pennsylvania* 403 U.S. 528 (1971)	11
McLaughlin v. *Florida*, 379 U.S. 184 (1964)	4, 10
Mancuso v. *Taft*, 476 F.2d 187 (1st Cir. 1973)	22
Martarella v. *Kelly*, 349 F. Supp. 575 (S.D.N.Y. 1972)	4, 11
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	18, 23
Miller v. *California*, 413 U.S. 15 (1973)	9
Mills v. *Alabama*, 384 U.S. 214 (1966)	6
Morales v. *Thurman*, 383 F. Supp. 53 (E.D. Tex. 1974)	11
NAACP v. *Button*, 371 U.S. 415 (1963)	22
Near v. *Minnesota*, 283 U.S. 697 (1930)	9
Nebraska Press Ass'n. v. *Stuart*, 427 U.S. 539 (1976)	4, 5, 6, 8, 9, 19
Nebraska Press Ass'n v. *Stuart*, 423 U.S. 1327 (1975) (Blackmun, Circuit Justice, mem)	19
Nelson v. *Heyne*, 491 F.2d 352 (7th Cir. 1974)	11
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	7
New York Times Co. v. *United States*, 430 U.S. 713 (1971)	10
Pell v. *Procunier*, 417 U.S. 817 (1974)	6
Red Lion Broadcasting Co., Inc. v. *FCC*, 495 U.S. 367	5, 22, 23
Reed v. *Reed*, 404 U.S. 71 (1971)	21
Regents of the University of California v. *Bakke* ____ U.S.____, 57 L.Ed.2d 750, (1978)	21

	Page
Roth v. *United States*, 354 U.S. 476 (1957)	9
Schenck v. *United States*, 249 U.S. 47 (1919)	10
Schneider v. *State*, 308 U.S. 147 (1939)	15
Shuttlesworth v. *City of Birmingham*, 394 U.S. 147 (1969)	5, 15, 17
Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)	22
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975)	16
State ex rel Harris v. *Calendine*, 233 S.E. 2d 318 (W. Va. 1977)	12
State ex rel Wilson v. *Barnbrick*, 195 S.E. 2d 721 (W. Va. 1973)	12
Staub v. *City of Baxley*, 355 U.S. 313 (1958)	5
Thomas v. *Collins*, 323 U.S. 516 (1945)	13
United States v. *C.I.O.*, 335 U.S. 106 (1948)	13
UNITED STATES CONSTITUTION:	
First Amendment	*passim*
Fourteenth Amendment	12, 21, 24
CONSTITUTION OF WEST VIRGINIA	10
STATUTES:	
West Virginia Code § 49-7-3	*passim*
OTHER AUTHORITIES:	
T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)	15
Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, (1955)	4, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

---

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association submits this brief amicus curiae in support of Respondents, Daily Mail Publishing Co., Don Marsh, The Daily Gazette Co., et al.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1324 newspapers constituting over 91 percent of the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business, and on several occasions over the years ANPA has presented its views on such issues, as an amicus curiae, to the Supreme Court of the United States and to other federal and state appellate courts. At present there are eighteen ANPA members in the State of West Virginia.

ANPA is greatly concerned about the enactment and existence of various state statutes which dictate to the press what matters of public interest may or may not be published; which subject the exercise of protected press freedoms to prior censorship at the hands of judges or other governmental officials; and which expose American newspapers to criminal convictions for the truthful publication of newsworthy information that has been obtained legally.

Because of these concerns and the potential erosion of First Amendment freedoms posed by the existence of state statutes such as West Virginia Code 49-7-3, ANPA respectfully presents for consideration by this Court its views on the very significant issues raised in this proceeding.

Questions Presented

I. Whether under the decisional authorities of this Court West Virginia Code Section 49-7-3 constitutes an unlawful prior restraint on constitutionally protected speech.

II. Whether West Virginia Code Section 49-7-3 is unconstitutional on its face for lack of ascertainable standards and may therefore be ignored with impunity.

III. Whether the statute in question is constitutionally deficient for failing to require the censoring authority to assess the effectiveness of a prior restraint on publication.

IV. Whether the statute violates the equal protection clause of the Fourteenth Amendment in requiring that only newspapers obtain court permission prior to publication while the broadcast and other print media are free to disseminate a juvenile's name.

Constitutional and Statutory Provisions Involved and Statement of the Case

ANPA adopts the constitutional and statutory provisions involved and statement of the case as set forth in the brief of Respondents. Additionally, ANPA asserts that the statute in question is violative of the Equal Protection clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

West Virginia Code 49-7-3 imposes an unlawful prior restraint on publication of information of legitimate public concern—the identity of a juvenile alleged to have fatally and feloniously shot a classmate while attending classes at a local

public high school. Petitioners assert that maintaining the confidentiality of a juvenile offender's identity through a restriction on publication by newspapers serves to effectuate that juvenile's "right to rehabilitation" and therefore outweighs any countervailing First Amendment values. Nonetheless, the juvenile offender's so-called right to rehabilitation, which some courts now regard as correspondent to the Constitution's prohibition of cruel and unusual punishment and requirement of due process, see *Martarella* v. *Kelly,* 349 F. Supp. 575, 585 (S.D.N.Y. 1972), heretofore has never been held sufficient to exempt a State from the fundamental doctrine against prior restraints on publication. See *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976). Moreover, even assuming that the state policy of rehabilitation rather than punishment, of its juvenile offenders is "paramount, one of vital importance," *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976), Petitioners have presented no evidence to show that West Virginia Code 49-7-3 is "necessary, and not merely rationally related, to the accomplishment of [that] policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). If publication of the identity of a juvenile offender endangers his allegedly paramount right to rehabilitation, "[t]he danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* 331 U.S. 367, 376 (1947).

There can be no doubt that the statutory scheme before this Court, both on its face and in effect, operates as a restraint on publication since it "undertakes to prevent future publication without advance approval . . . [and is] enforced by criminal prosecution for having published without the required approval." Emerson, *The Doctrine of Prior Restraint,* 20 LAW AND CONTEMP. PROB. 648, 655 (1955). But "[i]t is settled by a long line of . . . decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an

unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley,* 355 U.S. 313, 322 (1958).

For, where a statute imposes a prior restraint upon expression without providing objective and definite standards to guide the licensing or censoring authority, under the First and Fourteenth Amendments to the Constitution, parties subject to such authority "may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, 151 (1969).

In *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), this Court struck down a gag order prohibiting the particular content of publication on the ground, *inter alia,* that the size of the small community affected and other practical problems placed the efficacy of the order in grave doubt. West Virginia Code 49-7-3 is similarly deficient in failing to explicitly require, prior to its application to a specific publication, an assessment of its probable effectiveness in preserving a juvenile offender's allegedly compelling right to rehabilitation.

Your amicus respectfully submits that the statute in question also violates the equal protection clause of the Fourteenth Amendment in requiring that only newspapers obtain court permission to publish although the broadcast and other print media are free to disseminate a juvenile's name without prior approval. Differential treatment among various media of expression is permissible only if "reasonable and applied without discrimination." *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 387 (1969); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). The differential treatment directed at newspapers by West Virginia Code 47-7-3 is manifestly unreasonable and discriminatory since no legitimate state purpose is served in prohibiting only one medium from disseminating the name of a juvenile, particularly where the broadcast media may reach a much broader audience.

ARGUMENT

As stated by Respondents, the legal issue involved in this case is whether a newspaper's truthful publication, in violation of a criminal statute, of the name of a juvenile who is suspected in the homicide of a local high school student and who is the subject of juvenile court proceedings is protected speech under the First Amendment of the United States Constitution. This case does not involve the allegation that the Respondent newspapers unlawfully obtained the identity of the juvenile suspect. Nor does this case involve the scope of a state's power to deny access to juvenile court proceedings[1] or to punish participants in said proceedings for violating a mandate of confidentiality.

As stated by this Court in *Mills* v. *Alabama,* 384 U.S. 214, 218-19 (1966),

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs.

See also Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469, 491-92, 94 (1975); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964); *New*

[1] Your amicus agrees that in the presence of a compelling interest, it may be permissible for the state to attempt to preserve the confidentiality of certain information by limiting the access of the press to the sources of such information. *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974). Furthermore, this Court has held that the press enjoys no greater right of access than that of the general populace. *Houchins* v. *KQED, Inc.,* ____U.S.____, 57 L.Ed 2d 553 (1978). ANPA strongly asserts, however, that it is unconstitutional to prohibit publication of information, no matter how such information is obtained. *Nebraska Ass'n* v. *Stuart,* 427 U.S. 539, 570 (1976) (Brennan, J., concurring). It is similarly unconstitutional to punish, by criminal sanction, the publication of "information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." *Landmark Communications Inc.,* v. *Virginia,* ____U.S.____, 56 L.Ed. 2d 1, 17 (1978).

York Times Co. v. *Sullivan,* 376 U.S. 254, 270 (1964). Your amicus respectfully submits that, as a general matter, the operations of the local juvenile court system in its effort to cope with the increasing problems of youth crime and juvenile delinquency are "governmental affairs" of public interest to citizens within the affected community. More specifically, the apprehension, incarceration, judicial disposition, and *identity* of a local juvenile alleged to have fatally and feloniously shot a classmate while attending a local public high school are undoubtedly matters which legitimately concern students and adults alike and constitute protected speech under the First Amendment.

Counterposed against the constitutional right to publish the identity of a suspected murderer is the juvenile suspect's so-called "right to rehabilitation," asserted herein by the state acting in its *parens patriae* role.[2] Petitioners contend that a vital aspect of the process of rehabilitating juvenile offenders is maintaining to the greatest extent possible the confidentiality of the juvenile's name. It is contended that focusing public attention on a juvenile miscreant hampers that juvenile's efforts to reintegrate himself into lawful society and to lead a normal life. Petitioners maintain that, rather than serving as a deterrent to further delinquent behavior, publication of the names of juveniles involved in delinquency proceedings handicaps the

[2] In 1899 the Chicago Bar Association described the function of a state juvenile court system acting in its *parens patriae* role:

> The fundamental idea of the juvenile court law is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as to develop crime .... It proposes a plan whereby he may be treated not as criminal or legally charged with crime, but as a ward of the state, to receive practically the care, trust and discipline that are accorded the neglected and dependent child, and which, as the State acts, shall approximate as nearly as may be that which should be given by parents. R. Pound, "The Juvenile Court and the Law," National Probation Association Yearbook, 1944, Vol. 1, No. 3, p. 13.

juveniles' ability to obtain employment and earn the respect and confidence of the local community. Thus, Petitioners contend that, by barring publication, the state's efforts at successful rehabilitation of its wayward juveniles are enhanced to a degree sufficient to outweigh the abridgement of First Amendment freedoms imposed by West Virginia Code 49-7-3.

Petitioners urge this Court to endorse the decision in *Government of Virgin Islands* v. *Brodhurst,* 285 F.Supp. 831 (D.C. Virgin Islands, 1968). There, the United States District Court for the Virgin Islands held "that the advantages accomplished by the shielding of the names of juveniles from publicity outweighed those gained by allowing the publication of the names of children, [and that] [t]he limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders." Brief of the Petitioners at 9. While recognizing the vital need for providing a juvenile court system which can offer effective means of rehabilitating youthful offenders, your amicus respectfully submits that the statutory "right" of juvenile suspects in West Virginia not to have their identities disclosed by newspapers is of no constitutional consequence. It simply is not sufficiently compelling to justify the creation of a new exception to the constitutional prohibition on prior restraints on publication.

I. Under The Decisional Authority Governing Application Of The First Amendment To The United States Constitution, West Virginia Code 49-7-3 Constitutes An Impermissible Prior Restraint On Constitutionally Protected Speech

In *Nebraska Press Ass'n* v. *Stuart,* Mr. Justice Brennan correctly noted:

> [I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication. *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697, 713 [1930]

427 U.S. 539, 588 (1976) (Brennan, J., joined by Stewart and Marshall, J.J., concurring). Thus, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963).

It also is true, however, that "the [First Amendment] protection even as to previous restraint is not absolutely unlimited." *Near* v. *Minnesota,* 283 U.S. 697, 716 (1930). The established exceptions to such protection against previous restraints upon publication fall into three categories:

> The first two exceptions were that "the primary requirements of decency may be enforced against obscene publications," and that "[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force . . . .'"

Nebraska Press Ass'n, supra, at 590 (Brennan, J. concurring, citing *Near* v. *Minnesota, supra*).[3]

The third recognized exception, but one which this Court has never actually applied in practice, may arise when our country is at war, during which time "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota, supra* at 716.

Yet, even in a situation of national emergency caused by war, "the First Amendment [will] tolerate absolutely no prior

---

[3] These exceptions now have come to be construed as situations involving communications other than "speech" as encompassed within the meaning of the First Amendment. *See, e.g., Miller* v. *California,* 413 U.S. 15 (1973); *Roth* v. *United States,* 354 U.S. 476, 481 (1957); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co.* v. *United States,* 403 U.S. 713, 725-26 (1971) (Brennan J., concurring). Previous restraint upon the freedom of speech encompassed within the First Amendment is permissible only when said speech "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., joined by White, J., concurring). *Cf., Craig* v. *Harney,* 331 U.S. 367, 373 (1947); *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).

It is clear that West Virginia Code 49-7-3 imposes a prior restraint on speech which is protected under both the First Amendment to the United States Constitution and Article 3, §7 of the Constitution of West Virginia.[4] It requires newspapers (and *only* newspapers) to obtain a court order before publishing the name of a juvenile who is the subject of a delinquency proceeding. It also is clear that the alleged violation of a juvenile offender's right to rehabilitation, which Petitioners assert will result from publication of the juvenile offender's identity, does not fall within the traditional exceptions to the ban on prior restraints. The issue which this Court must face, therefore, is whether a juvenile offender's specific right under West Virginia Code 49-7-3 not to have his identity published constitutes either (a) a new right of constitutional dimension which justifies the curtailment of freedom of speech or (b) a compelling state interest which is seriously and imminently threatened by the publication at issue herein and which cannot be accomplished by other means less restrictive of First Amendment freedoms. *See, e.g., McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964); *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960); *Craig* v. *Harney,* 331 U.S. 367, 373 (1947).

[4] No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

It can be assumed that significant state interests underlie West Virginia's statutory policy of providing a mechanism for the rehabilitation, rather than punishment, of its juvenile offenders. In other jurisdictions the courts have held that juvenile inmates have a constitutional right to rehabilitative treatment. See *Nelson* v. *Heyne,* 491 F.2d 352 (7th Cir. 1974); *Morales* v. *Thurman,* 383 F.Supp. 53 (E.D. Tex. 1974); *Martarella* v. *Kelley,* 349 F.Supp. 575 (S.D.N.Y. 1972); *Inmates of Boys Training School* v. *Affleck,* 346 F.Supp. 1354 (D.R.I. 1972). These courts have held that the minimal treatment required to provide incarcerated juveniles their right to constitutional due process "should, so far as can be reasonably required, be what proper parental care would provide." *Nelson* v. *Heyne,* 491 F.2d 352, 360 (7th Cir. 1974). None of these decisions, however, have held that provision for maintaining the confidentiality of a juvenile offender's identity is either an element of due process or necessary to prevent cruel and unusual punishment.

Nor has this Court definitively decided that a youth confined under jurisdiction of a juvenile court has a general constitutional right to treatment[5] or that a provision such as West Virginia Code 49-7-3 is a necessary element in either a constitutional or a compelling state statutory scheme of rehabilitation.[6]

[5] The primary thrust of this court's decisions in *In re Winship,* 397 U.S. 358 (1970) and *In re Gault,* 387 U.S. 1 (1967) is the desirability, or rather necessity, for accurate fact-finding and adjudicative procedures. *Cf., McKeiver* v. *Pennsylvania,* 403 U.S. 528, 531 (1971) (juveniles not entitled to jury trial).

[6] The fundamental constitutional interest in protecting the press from previous restraints on publication need not be balanced herein against the state's interest in the rehabilitation of maladjusted or delinquent juveniles. It is not contended herein that the numerous elements of West Virginia's juvenile rehabilitation program other than West Virginia Code 49-7-3 conflict with Respondents' First Amendment freedoms. Nor have Petitioners demonstrated that an effective overall program of rehabilitation necessitates keeping the identity of juvenile offenders confidential.

As justification for the prior restraint on publication imposed by the statute in question, Petitioners also advert to the West Virginia state policy of rehabilitation as discussed in *State ex rel. Harris* v. *Calendine,* 233 S.E. 2d 318 (W.Va. 1977). There, the West Virginia Supreme Court of Appeals reaffirmed that a juvenile defendant in a delinquency proceeding is entitled to the procedural protections of the due process clause of the Fourteenth Amendment to the Federal Constitution. *See, In re Gault,* 387 U.S. 1, 24 (1967); *State ex rel. Wilson* v. *Barnbrick,* 195 S.E. 2d 721 (W.Va. 1973); W.Va.Code, 49-5-10 (1975). While noting that "[t]he legislature could choose to punish children guilty of criminal conduct . . . , but as a matter of public policy . . . provided instead for a comprehensive system of child welfare,"[7] 233 S.E.2d at 325, the Court specifically held that because of the fundamental difference between a juvenile status offender and a juvenile criminal offender, the indiscriminate incarceration of status offenders together with criminal offenders violated the status offenders' right to equal protection of the laws, their right to substantive due process, and their right to protection against cruel and unusual punishment. Thus, Petitioners' reliance upon *Harris* is misplaced, for the Court there did not address either the specific state policy contained in West Virginia Code 49-7-3 or the resolution of any

[7] The court nevertheless acknowledged that "[i]t has always been assumed that the Legislature can at any time withdraw some or all of the benefits of this system from children guilty of criminal conduct." 233 S.E.2nd at 326. Thus, although legal proceedings for the adjudication of a juvenile as a "delinquent" must comport with procedural due process, and the incarceration of status offenders under the states' statutory policy of *parens patriae* must afford substantive due process and equal protection of the laws, the court did not hold that either the general right of a juvenile criminal offender to rehabilitation, or his specific right not to have his identity published, is a constitutional protection.

conflict between a juvenile criminal offender's right to have his identity kept secret and the First Amendment rights of anyone else.[8]

In assessing whether West Virginia's policy for the rehabilitation of Stewart Perrock, as advanced by section 49-7-3, outweighs the First Amendment right of newspapers to publish his identity, various factors relevant to this Court's standard of review must be borne in mind. First, this Court has made it clear that laws which regulate activities protected by the First Amendment are not accorded the presumption of constitutionality normally accorded to acts of a legislature. *See United States* v. *C.I.O.,* 335 U.S. 106(1948). Second, statutes regulating constitutionally protected activities must be more than merely rational; the government must have a compelling state interest to justify the curtailment of otherwise protected speech, and the scope of the curtailment must not be greater than reasonably necessary to serve the state's purpose. *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

II. Where A Statutory Scheme Requiring Official Permission To Exercise First Amendment Rights Is Unconstitutional For Lack Of Standards, Such Statutory Scheme May Be Ignored With Impunity

Your amicus respectfully submits that the Supreme Court of Appeals of West Virginia correctly concluded that West

[8] In *Landmark Communications, Inc.* v. *Virginia,* ____U.S. ____, 56 L.Ed.2d 1, (1978), the Commonwealth of Virginia argued that criminal penalties against third parties who divulge information regarding confidential proceedings before a state judicial review commission were necessary to insure the effectiveness of said commission, and thereby protect the reputation of its judges and maintain the integrity of its judicial system. Yet this Court held that "neither the Commonwealth's interest in protecting the reputation of its judges, nor in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality." *Id.* at 12.

Virginia Code 49-7-3 imposed a prior restraint upon publication. The language of the statute prohibits publication without explicit court permission:

> Nor shall the name of any child in connection with any proceedings under this chapter be published in any newspaper without a written order of the court.

Review and analysis of the cases decided by this Court and of the theory underlying the doctrine of prior restraint demonstrate that the statute at issue, both on its face and in effect, operates as an unlawful prior restraint on publication.[9] Moreover, it is firmly established that, where a statute imposes a prior restraint without adequate standards, a person faced with such an unconstitutional statute may ignore it and engage with impunity in the exercise of the right of free expression for which

---

[9] In Professor Thomas I. Emerson's now famous article, "The Doctrine of Prior Restraint," 20, *Law and Contemp. Prob.* 648, (1955), he sets out four categories, the first of which is pertinent to analysis of the case at bar. Professor Emerson states:

> The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official. Such limitations are normally enforced by criminal prosecution for having published without the required approval, the prosecution being based upon mere failure to obtain approval and not on any issue concerning the content or manner of the publication. Examples of this type of prior restraint are the English licensing laws, motion picture censorship, the requirement of permits for park meetings, and the like. In some cases, the method of enforcement may be refusal by the official to make available government facilities or services, such as in denial of the use of the mails.

Id. at 655.

The statutory scheme in question involves a slight variation. A judicial official rather than an executive official is empowered to grant or refuse approval to publish. But here again, prosecution is based upon "mere failure to obtain approval" and not upon the content or manner of publication.

the law purports to require prior official approval. *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969). "[This] rule seems eminently sound and has not been seriously contested." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 378-79 (1970). *See also, Kunz* v. *New York,* 340 U.S. 290, 293-94 (1951); *Schneider* v. *State,* 308 U.S. 147, 161-62 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

In *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969), this Court held violative of the First Amendment a statute giving a City Commission power to refuse to issue a permit for any "parade," "procession" or "demonstration" where the Commission determined that the "public welfare, peace, safety, health, decency, good order, morale or convenience" were endangered. This result was reached in spite of the Supreme Court of Alabama's attempt to "perform ... plastic surgery upon the face of the ordinance" by holding that, in the future, certain standards should apply. *Id.* at 153-54.

Writing for the Court, Justice Stewart, made an unequivocal finding that a prior restraint existed and that the statute could be properly ignored by those who sought to exercise First Amendment rights. The opinion stated:

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance, which like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley,* 355 U.S. 313, 322.

394 U.S. at 150-51. Justice Stewart went on to say:

> And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.

Id.

This Court reached a similar conclusion in *Hague* v. *C.I.O.*, 307 U.S. 496 (1938). There, a city ordinance purportedly forbade public assembly in parks or streets in the absence of an appropriate permit; such a permit could be obtained only from a local official who was empowered to refuse issuance of the permit if, in his judgment, riots or disturbances would be prevented thereby. The ordinance was struck down as violative of the First Amendment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a Connecticut statute, which required religious groups to obtain approval from a state administrative office prior to soliciting support for their organizations, was held to constitute an unlawful prior restraint on the exercise of First Amendment rights. Speaking for a unanimous Court, Justice Roberts stated:

> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

310 U.S. at 307.

More recently, in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), this Court struck down as violative of the First Amendment a statutory scheme which enabled a municipal licensing board to deny permission to use a city-leased theater where, in the Board's view, the production sought to be

presented would not be "in the best interests of the community." This standard was held to be lacking in constitutionally required procedural safeguards. Justice White and Chief Justice Burger pointed out in dissent, however, that the standard lease form used by the city required compliance with state and local laws governing obscenity and "in this respect the licensing system [was] not without standards." *Id.* at 564. In the area of obscenity, however, this Court has developed a well established body of constitutional law providing extensive jurisprudential standards for determining when a prior restraint on publication is constitutionally permissible under state law. Reference to that body of law provides state and local administrative authorities and courts with the ultimate standards under which they may exercise their authority to grant or deny use of the theater.

In the case before this Court, there is no analogous body of law to provide a judge in a juvenile proceeding with standards for determining when the name of the accused may be published. Moreover, it seems clear from *Shuttlesworth* that a statute which provides no standards on its face may not be rendered constitutional by "plastic surgery", however skillfully performed, by an appellate court. 394 U.S. at 153-54.

West Virginia Code 49-7-3 requires that a newspaper obtain a "permit" in the form of a court order prior to publishing the name of a juvenile adjudicated delinquent. This statute is without any standards whatever. It therefore allows a judge to act in an arbitrary manner with unfettered discretion in regard to the issuance of orders allowing publication.

The fact that a judicial official rather than an administrative official is the grantor of the "license" provides no basis for distinguishing this statute from the statute held unconstitutional in *Shuttlesworth*. The fear that an administrative official, exercising his discretion in the absence of appropriate standards, may make decisions based on his own predispositions and beliefs is applicable equally to judges. As

Justice Douglas stated in *Chandler* v. *Judicial Council,* 398 U.S. 74 (1970):

> Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

Id. at 137 (Douglas, J., dissenting), *quoted with approval in Laird* v. *Tatum,* 409 U.S. 824, 834 (1972) (Rehnquist, J., mem.). For this reason, judges as well as administrators must be supplied with narrow, objective and definite standards when First Amendment rights are involved.

To distinguish West Virginia Code 49-7-3 on the ground that it involves a judicial rather than an administrative official would be to exalt form over substance. As this Court has recognized, "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 256 (1974).

In view of the foregoing, it is clear that West Virginia Code 49-7-3 imposes an unconstitutional prior restraint on publication by requiring a newspaper to obtain a court order before it may publish, while providing no standards to govern the issuance of such an order. When controls on publication operate in advance through a system of administrative permits, court injunction, or, as here, judicial sanction, delay is endemic. Time is of the essence in "the reporting of news by the media, [for] each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed

information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n.* v. *Stuart,* 423 U.S. 1327, 1329 (1975) (Blackmum, Circuit Justice, mem). A prior restraint is more easily imposed, requires less foundation in provable facts, and is less carefully weighed than is the imposition of subsequent punishment. Even the best intended system of advance controls is difficult to administer in a way that fully safeguards First Amendment rights; an ill-intended system easily can be utilized to throttle those rights. "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish." *Landmark Communications, Inc.,* v. *Virginia,* ____U.S.____, 56 L.ed 2d 1, 17 (1978) (Stewart, J., concurring).

III. West Virginia Code 49-7-3 Is Constitutionally Deficient In Failing To Require, Prior To Its Application, A Showing Of Its Probable Effectiveness In Achieving The State Interest It Is Designed To Serve.

In assessing whether a particular state interest is sufficient to justify the curtailment of free speech, this Court has taken the firm position that, where a prior restraint on publication is involved, the probable efficacy of such a measure must be carefully assessed. In *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), this Court struck down a gag order prohibiting publication on the ground, *inter alia,* that the practical problems involved placed the efficacy of the order in grave doubt. Chief Justice Burger, writing for the Court, stated:

> Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be

> more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Id. at 567.

Your amicus respectfully submits that a statute prohibiting publication by newspapers of the name of a juvenile offender is similarly ineffective and therefore unconstitutional. Under the terms of West Virginia Code 49-7-3, news media other than newspapers are free to publish the names of juvenile offenders; and all news media evidently may publish other details about a juvenile offender which in a community the size of St. Albans, West Virginia, may be just as identifying as his name—*i.e.,* his address, his parents' names, his school, his photograph, etc. In addition, court reporters, prosecuting attorneys, defense attorneys, and other participants in delinquency proceedings are not subject to this statute and presumably may divulge a juvenile offender's identity with impunity.

The ineffectiveness of this statute in the instant case can be easily demonstrated. The alleged murder occurred in the town of St. Albans, West Virginia, a community of approximately 14,300 people.[10] Many of the residents of this community were personally acquainted with both the accused and the victim. There were seven eyewitnesses to the shooting. News sources for a story published by the Charleston *Daily Mail* on February 10, 1978, included a Lieutenant in the Kanawha County Sheriff's Office, a trooper with the West Virginia State Police, and an Assistant Prosecuting Attorney for Kanawha County. Moreover, the name of the accused had already been made public by the broadcast media on February 9, 1978, prior to publication by the Charleston *Gazette* and *Daily Mail.* In light of these facts, there can be little doubt that the prohibition upon publication contained in West Virginia Code 49-7-3 is ineffective in preserving the anonymity of juvenile offenders.

---

[10] Rand McNally Commercial Atlas & Marketing Guide (1977) (estimated population).

Your amicus respectfully submits that, at the time and under the circumstances of Respondents' publications, there was absolutely no evidence that, but for such publications Stewart Perrock's identity would have remained confidential, or that his chances for ultimate rehabilitation would have been diminished in any way. Moreover, the statute in question is constitutionally deficient in failing to require this type of an assessment of the effectiveness of the restraint on publication.

IV. West Virginia Code 49-7-3 Violates The Equal Protection Clause Of The Fourteenth Amendment In Requiring That Only Newspapers Obtain A Court Order Prior To Publication.

The Supreme Court of Appeals of West Virginia found it unnecessary to address the equal protection issue, choosing instead to decide this case on First Amendment grounds. The question of equal protection, however, was argued before that court. In a recent case characterized by a similar procedural posture, this Court utilized as the basis for its decision an argument which was raised but not addressed by the court below. *Regents of the University of California* v. *Bakke,* ____U.S.____, 57 L.Ed.2d 750, 765 (1978).

Your amicus respectfully submits that the West Virginia statute which prohibits all newspapers from publishing the name of juveniles accused of a crime, while permitting the accused's name to be broadcast or disseminated by other individuals, clearly violates the equal protection guarantees embodied in the Fourteenth Amendment. The right to equal protection assures that the government cannot "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U.S. 412,

415 (1920)." *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971). A denial of equal protection is subject to "strict scrutiny" where the classification involved affects "basic civil rights." *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942). Among those rights is the right to publish a newspaper. *Gitlow* v. *New York,* 268 U.S. 652 (1925). This Court has required strict scrutiny whenever a classification is even "closely intertwined" with First Amendment rights. *Chicago Police Department* v. *Mosley* 408 U.S. 92, 95 (1972). *See also NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *Mancuso* v. *Taft,* 476 F.2d 187, 192-96 (1st Cir. 1973). Under this standard, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Chicago Police Department* v. *Mosley, supra* at 95. The statute in question clearly fails this test. The state of West Virginia is apparently attempting to prevent the dissemination of the names of juveniles accused of crimes. This objective is in no way "furthered" by prohibiting publication in a newspaper while allowing the name to be disseminated by the broadcast media.

In two cases involving broadcasting regulations, this Court has upheld differential treatment for broadcasters as opposed to newspapers. *See CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973); *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969). In *Red Lion,* this Court concluded that such differential treatment was warranted because:

> [B]roadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.

Id. at 376.

Your amicus strongly asserts that *Red Lion* and *CBS* are inapposite to the case before this Court. In those cases, federal

regulation of the broadcast media was held permissible on the ground that inherent differences in the technical nature of the broadcast media justified differential treatment under the First Amendment. In the case before this Court, the discriminatory treatment which newspapers receive is arbitrary, irrational, and unrelated to the purposes the statute seeks to achieve. Broadcasting a juvenile's name may well result in greater dissemination than "illegal" publication in a newspaper. The differential treatment afforded newspapers by this statute, therefore, is certainly not based on inherent differences in the nature of the two media. Differential treatment among various media of expression is only permissible if "reasonable and applied without discrimination." *Red Lion, supra* at 387; *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). The differential treatment directed at newspapers by West Virginia Code 47-7-3 is manifestly unreasonable and discriminatory since no legitimate state purpose is served in prohibiting only one medium from disseminating the name of a juvenile, particularly where the broadcast media may well reach a larger audience.

Your amicus does not suggest, that redrafting the statute to include the broadcast media would render it constitutionally permissible. The statute would still violate the First Amendment. We note in passing that all our arguments regarding prior restraints on publication should apply with equal weight to prior restraints on broadcasting. *See Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974).

CONCLUSION

In light of the foregoing, your amicus urges this Court to uphold the ruling of the Supreme Court of Appeals of West Virginia in striking down West Virginia Code, Section 49-7-3 as an unconstitutional prior restraint on the right of a newspaper to publish. Likewise, this Court well might find the West Virginia Statute to be violative of the equal protection clause of the Fourteenth Amendment, in denying to newspapers a right, enjoyed by other media, to fully inform the public.

Respectfully submitted,

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amicus Curiae
Amican Newspaper Publishers
Association

Supreme Court, U. S.
FILED
DEC 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-482

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,

Petitioners,

vs.

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.,

Respondents.

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,

Petitioners,

vs.

DON MARSH, ET AL., THE
DAILY GAZETTE CO., ETC.,
ET AL.,

Respondents.

BRIEF OF THE AMICI CURIAE

PAUL RAYMOND STONE
Pro Se
And
CHARLES R. GARTEN
Counsel for
Juvenile Defender
Attorney Program
1116-B Kanawha Blvd, E
Charleston, WV 25301

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-482

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,
Petitioners,

vs.

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.,
Respondents.

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,
Petitioners,

vs.

DON MARSH, ET AL., THE
DAILY GAZETTE CO., ETC., ET AL.,
Respondents.

BRIEF OF THE AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The Juvenile Defender Attorney Program is a non-profit, volunteer attorney group based in Charleston, West Virginia, whose purpose is to protect and promote the legal interests of children in connection with the West Virginia juvenile justice system, and to serve as a resource and training device for attorneys in West Virginia who represent children. This

Defender group also includes West Virginia state legislators, a member of the West Virginia Board of Law Examiners, and a former State Welfare Commissioner. The Juvenile Defender Attorney Program is concerned particularly with protection and expansion of state and federal constitutional rights of children charged by law with juvenile offenses, and also with the rights of those children who have been neglected or abused either by parents or guardians.

Paul Raymond Stone, an attorney who is a member and co-founder of the Juvenile Defender group and a member of the United States Supreme Court Bar, is an assistant professor in the Psychology Department of the West Virginia College of Graduate Studies. He instructs a class entitled "The Legal and Psychological Aspects of Juvenile Delinquency". He has had an interest in juvenile rights for a number of years, and has initiated several programs in furtherance of such rights.

Dr. Paul L. Crawford is the Chairman of the Department of Psychology at West Virginia State College, Institute, West Virginia, and is also adjunct Professor in the Psychiatry Department of

the West Virginia University School of Medicine. He is, and has been since 1969, a consultant in the Division of Forensic Psychiatry, Department of Mental Health and Retardation, State of Ohio. He has been active and instrumental in the field of juvenile rights, as well as in the area of treatment and diagnosis of children with various psychological aberrations. Dr. Crawford is particularly concerned with the adverse, stigmatizing effect which pervasive publication of an accused child's name may have on his prospects for future successful integration into the community and the avoidance of further acts of delinquency. He is also concerned about the effect of such name publication on efforts to rehabilitate the children of our nation.

Written consent from the parties to this case, through their respective attorneys, for the filing of this amici curiae brief is on file with the Clerk of this Court.

ARGUMENT

This case involves the issue, as defined by this Court in its grant of certiorari, whether

or not the freedom of press under the First Amendment to the United States Constitution is infringed by the West Virginia state statute prohibiting the publication of the name of a juvenile defendant in a newspaper.

Your Amici respectfully contend that if respondents prevail in these proceedings, in their attack on West Virginia Code §49-7-3, it would be a substantial set-back of the efforts of the State to foster rehabilitation of juvenile delinquents and to prevent future delinquency of countless thousands of children accused of acts of delinquency, whose charged offenses may not be as serious as that of the juvenile whose case provided the setting for the instant attack on this statute by the newspaper personnel. Publication of a child's name, in the opinion of the experts, is regarded as a traumatic stigma, counterproductive to any effort at rehabilitation in the majority of instances.

The two cases at Bar are different, on the facts, from the situation in Oklahoma Pub. Co. v. District Court In and For Oklahoma County, 97 S.Ct. 1045 (1977), Nebraska Press Assn. v. Stuart, 96

S.Ct. 2791 (1976), and in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In these latter three cases, the information sought to be banned by the state was already in the "public domain" because of the availability of such information from law enforcement or court personnel or by acquiescence of such personnel. In the Oklahoma case, by far the strongest case relied upon by respondents, such confidential or prohibited information, including the identity of the juvenile, was actually made available to the press because of the conduct of the court and its law enforcement personnel. Representatives of the press were permitted to sit in the courtroom during the juvenile hearing, and thus learn the child's identity and other facts; no objection was made by the judge or court personnel to the photographing of such juvenile. In the cases at Bar, there was no such violation, or permitted violation of confidentiality by law enforcement personnel or by the Circuit (Juvenile) Court of Kanawha County or its personnel. The method whereby the respondents learned of the pertinent facts and identity of

the said child here involved had nothing to do with any culpability of the court or its officials, or other public officials. It was due solely to the fortuitous nature of the manner in which the alleged crime occurred in or near public school premises, with many witnesses. Thus, the court, and its personnel and law enforcement officials, unlike the situation in the Oklahoma Publishing Co. case, supra, did not reveal prohibited material to the press. The press later learned the facts, as it may do presently and in the future, from bystanders and other non-public witnesses. It is the understanding of your Amici that the court and law enforcement personnel in the cases at Bar have been most scrupulous in avoiding any revelation to the press or other media as to any of the incidents including identity of the juvenile. Thus, the cases are distinguishable.

If we permit what the press may have learned in this case, simply from the fortuitous circumstances involved, to be further propagated, it will compound the situation. Where previously only a limited segment of the public learned of such

facts, the conduct of the press in publishing this prohibited matter has geometrically disseminated such prohibited disclosure to the readers throughout the extensive circulation area in a manner counterproductive to the rehabilitative purposes of the statute. To allow the press, where the initial revelation has been from non-court or law enforcement sources, to use the convenient excuse that the matter has already become "public knowledge", however limited such public knowledge may be, would be to thwart the salutary purpose of the statute. Such is not the teaching of the Oklahoma case.

Contrary to a prior assertion in one brief in the Oklahoma case, supra, before this Court, the State of West Virginia does, and has for years, limited access to juvenile records. West Virginia Code § 49-5-1 .

The Supreme Court of the United States in In Re Gault, 387 U.S. 1 (1967) states:

> In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of

> records of police contacts and court action relating to juveniles. (emphasis supplied) 387 U.S. at 25

The above would appear to provide adequate predicate to prohibit the disclosure, in whatever manner, of the indicia of juvenile proceedings including the identity of the accused.

The doctrine of parens patriae, which provides one of the main bases on which the unique concept of the juvenile court and its procedures were created, is for the primary protection of the children of our State. To use the vernacular, such doctrine provides the warrant for an entirely different "ball game"—i.e., juvenile proceedings and their safeguards vis-a-vis the procedures applicable in adult court. The right to a public trial is not an inherent right in the typical juvenile court statute. To now permit, by appellate court action, the publication of a child's name, when coupled together with all the other permissably reported factual material in connection with a juvenile case, would be to expose the child to public view in the same manner as now obtains in connection with adult cases. The result may well be to defeat the beneficent,

rehabilitative purposes for which the juvenile court was created in the first instance. Indeed, it has been held by the United States Supreme Court,[1] without doubt on the analogy just made, that there is no inherent constitutional right to a jury trial since, among other things, such could result in public exposure, at least to a limited degree. Although West Virginia accords children such right, it should be emphasized that it is their right, not that of the newspapers, to so be subjected to this limited public exposure. And it is the understanding of your Amici that jury trials in this State in juvenile cases are relatively rare.

If petitioners prevail in this case, moreover, the expungement provisions of the West Virginia Juvenile Code will be rendered virtually meaningless. Under the provisions of this law, juvenile records are expunged by operation of law.[2] If the identity of the juvenile is

---

[1] McKeiver v. Pennsylvania, 403 U.S. 528 (1971)

[2] West Virginia Code § 49-5-17 (Michie 1978)

permitted to be connected with the facts of his offense and printed in a newspaper, such expungement provisions will be, in large measure, rendered nugatory and illusory.

One respondent criticism is the prerogative of the judge, by written court order, to permit publication of a juvenile's name. No doubt such was primarily intended for use in cases of repeated offenders where protection against public stigmatizing may have become meaningless. Moreover, in rare instances, there may be some deterrent effect on a juvenile who is a repeat offender and knows that his name is subject to publication at the instance of the judge because of repeated juvenile court exposure. A judge is the arbiter of what is most promotive of ultimate rehabilitation; thus, there is a rational basis, even a compelling state interest, in making this "prior restraint" complained of by respondents subject to such possible exception.

The Congress of the United States, through Congressional Committee reports, as well as by statute[3], now has adopted a position identical to

---

[3] 18 U.S.C. 5038(d)

that underlying the disputed state statute for juveniles whose cases are not triable in adult court. Under then existing West Virginia law, the child whose case underlies this court action of the respondents cannot be subject to trial in adult court, it is noted. There are many cases of juvenile delinquency which involve co-extensive violations of both state and federal statutes (e.g., drug offenses, auto theft and subsequent interstate transportation thereof, etc.). The federal court will not take jurisdiction under its statutes, if the state court does so; hence, this is a matter fraught with considerable fortuity. A juvenile really does not know, in connection with many types of offense, whether a state court or a federal court will ultimately take jurisdiction. The federal statute, Title 18 U.S.C. § 5038(d), should be assigned the utmost importance in the ultimate resolution of this case. If this Court upholds the West Virginia Supreme Court in the case at Bar, this federal statute will undoubtedly later be stricken down on First Amendment grounds. Is this Court now prepared to

effect such a drastic result?

Additionally, U.S. Code Congressional and Administrative News, 1974, Vol. 3, page 5288, recites pertinent legislative history underlying the various federal juvenile delinquency statutes, including P.L. 93-415; the Congress notes that any adverse "labeling" is counterproductive in the efforts at combating juvenile delinquency. Therein it is stated:

> In testimony before the Subcommittee, the President of the National Association of State Juvenile Delinquency Program Administrators on February 22, 1973, said in part:
>
> * * *
>
> "The structural and procedural system has two built-in patterns that tend to be self-defeating. First, the youth in need or trouble is identified and labeled. As he is labeled, certain sanctions are imposed and certain critical stances assumed. The sanctions and the stance tend to convince the individual that he is deviant, that he is different, and to confirm any doubts he may have had about his capacity to function in the manner of the majority.
>
> * * *
>
> Our objective must be, therefore, to minimize the youngster's penetration into all negative

labeling, institutional processes."

The revelation of a child's name, which the respondents seek and which is contrary to the policy of the West Virginia legislature and to federal policy, will certainly result in such counterproductive, adverse labeling.

Additionally, there is now, and has been for some years, a federal impetus and concomitant federal funding availability for community-based juvenile treatment centers. If a child's name is already made pervasively known throughout the community, by extensive newspaper publication thereof, such community efforts and federal subsidies will be largely thwarted, insofar as a meaningful rehabilitative effect in many cases is concerned.

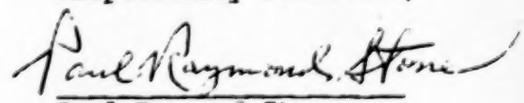
Irrespective of the claims which respondents make under the federal Constitution as to due process and freedom of the press, it is noted that a cardinal principle of constitutional law exists for the deprivation of a constitutional right provided that there is a "compelling state interest" therefor. See Sherbert v. Verner, 374 U.S. 398 (1963) in which the United States

Supreme Court enunciated, and more comprehensively articulated, this doctrine. It is respectfully submitted that there is a "compelling state interest" in rehabilitating juvenile offenders, and preventing future criminality, which is served by the statute herein assailed, which--aside from the other reasons for holding it constitutional and valid (as hereinbefore enumerated)--warrants upholding on this "compelling state interest" principle alone.

CONCLUSION

For the reasons stated hereinbefore, it is urged that this Court in these cases reverse the decision below of the West Virginia Supreme Court.

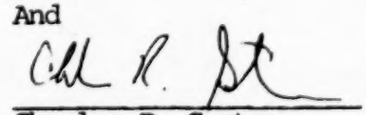
Respectfully submitted,



Paul Raymond Stone
Pro Se

Date: Dec. 23, 1978

And



Charles R. Garten

Counsel for
Amici Curiae
1116-B Kanawha Blvd., E.
Charleston, WV 25301

CERTIFICATE OF SERVICE

I, Paul Raymond Stone, a member of the Bar of The Supreme Court of the United States, on behalf of the Amici Curiae, hereby certify that, on the 23rd day of December, 1978, I served three copies of the foregoing Brief Amici Curiae on each of the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Rudolph L. DiTrapano, Attorney at Law, DiTrapano, Mitchell, Lawson and Field, 604 Virginia Street, East, Charleston, West Virginia 25301 and F. Paul Chambers, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P.O. Box 553, Charleston, West Virginia 25322; and the Hon. Cletus B. Hanley, Counsel for Petitioners, State Capitol, Charleston, WV 20305. I further certify that all parties required to be served have been served.

Paul Raymond Stone

Paul Raymond Stone
1116-B Kanawha Boulevard, East
Charleston, WV 25301